Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

STATE OF COLORADO and VICTORIA BUCKLEY, in her official capacity as SECRETARY OF STATE,
Petitioners,
vs.
JENNIE SANCHEZ, ADELINE SANCHEZ and DEBRA CASANOVA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether a *de facto* requirement of proportional representation of the State Legislature results under § 2 of the Voting Rights Act when the minority group:

(a) has not proposed a reasonable benchmark district incorporating traditional districting principles;

(b) has presented a limited statistical polarization analysis based only on election contests involving majority-minority candidates and has ignored electoral factors such as partisanship and incumbency; and

(c) has depended primarily upon the limited statistical analysis to prove the totality of the circumstances.

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

The State of Colorado and Victoria Buckley, the Colorado Secretary of State, petition for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 97 F.3d 1303 (10th Cir. 1996) (Pet. App. A). The district court opinion is reported at 861 F. Supp. 1516 (D. Colo. 1994) (Pet. App. B).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254 and 2101. The opinion of the Court of Appeals was issued on September 30, 1996 (Pet. App. A-1). A petition for rehearing and a suggestion for hearing en banc were filed on October 15, 1996. The petition and suggestion were denied on November 29, 1996 (Pet. App. C). An application for extension of time until and including March 14, 1997 to file this petition was granted on February 14, 1997 (Pet. App. D).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1973:

> *Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation.*
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equal-

> ly open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE FACTS

As a result of the 1990 census, Colorado was required to redistrict its 65 single-member state representative districts and 35 single-member senate districts. The reapportionment process was conducted by a bipartisan, multi-ethnic commission comprised of eleven members appointed by the Governor, legislature and Colorado Supreme Court Chief Justice. Colo. Const. art. V, § 48.

State House District 60 was redrawn during the 1991 reapportionment process. Located in rural, South Central Colorado, it presently includes the six counties (Alamosa, Conejos, Costilla, Mineral, Rio Grande and Saguache) which comprise a geographical region called the San Luis Valley, as well as Huerfano County and that portion of Las Animas County that is west of the City of Trinidad (Pet. App. B-2 and O).[1] Hispanics comprised 45.31% of the total popula-

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[1] The San Luis Valley is bound on the north, east and west by (continued...)

tion of the district in 1991, and 42.38% of the voting age population (Pet. App. B-2).

Prior to considering proposed districts for Southern Colorado, the Commission reviewed a racial bloc voting analysis conducted by Election Data Services (EDS). Although EDS found some evidence of racial polarization in San Luis Valley local and county elections, it concluded that a majority Hispanic district (52%) was unnecessary because of significant white crossover voting (20%). EDS recommended that the State maximize Hispanic voting strength in the region to the extent possible, despite its acknowledgment that its data was limited. *See* Pet. App. H.

Based on these findings, the Commission approved a preliminary districting plan for H.D. 60 which contained a total Hispanic population of approximately 48%.[2] It split

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[1](...continued)
mountain ranges with peaks of more than 14,000 feet. The southern end of the San Luis Valley abuts New Mexico (Pet. App. A-3 and O). The San Luis Valley's physical isolation engendered the development of a strong community of interest. The strength of that community of interest is reflected in the number and variety of valley-wide planning organizations such as: the San Luis Valley County Commissioners' Association; the San Luis Valley Regional Development and Planning Commission; the San Luis Valley Bar Association and the San Luis Valley Peace Officers' Association, among others. The San Luis Valley is also single judicial district and is designated as a separate economic development district. In addition, it has its own college, Adams State College, and health and mental health services are coordinated throughout the San Luis Valley. (Pet. App. F and G.)

[2] The Commission never considered any plans which created a majority Hispanic district. At its very first meeting, the State (continued...)

counties within the San Luis Valley and displaced two incumbents.

The Commission held twenty public hearings across the State after the preliminary plan was published (Pet. App. K-14). Most of the witnesses at hearings in Southern Colorado advocated for keeping the San Luis Valley in one house district.[3] Hispanics in the San Luis Valley testified that a majority Hispanic district was not necessary, and that any plan which split the San Luis Valley would likely decrease Hispanic political opportunity (Pet. App. M-5 - M-11).

In response to concerns raised at the hearings, the Commission decided not to adopt the preliminary plan and, instead, considered five alternative plans for H.D. 60 which kept the San Luis Valley intact. Since the San Luis Valley is sparsely populated and does not contain a sufficient number of residents to form its own single-member house

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[2](...continued)
Hispanic League, the largest Hispanic organization in the state, informed the Commission that it was its position that no majority-minority Hispanic districts be created in the State. The League told the Commission that it preferred that the State create three Hispanic influence districts in Southern Colorado. (Pet. App. I-13 and J-4.)

[3] Since 1982, the counties comprising the San Luis Valley have been included in the same House district to avoid dilution of Hispanic voting strength. During the 1981 reapportionment process, Hispanics urged the Reapportionment Commission to place Costilla County, the most heavily Hispanic populated county in Colorado, in the same house district as the other five San Luis Valley counties. The joinder of Costilla County was supported by Representative Entz, who Respondents' claim does not represent them (Pet. App. L-4).

district,[4] the Commission considered plans which placed residents from adjoining counties in the same district as the San Luis Valley. Commission discussions focused on the most appropriate areas to include in a district with the San Luis Valley. The Commission wanted to avoid dilution of Hispanic voting strength in the Valley, as well as the voting strength of Hispanics in adjacent areas. The Commission also wanted to adhere to traditional districting principles. Faced with these difficult choices, the Commission ultimately adopted a plan which balanced all of these competing considerations. The new H.D. 60 increased Hispanic population by more than five percent over the previous plan and included only one county split (Pet. App. O, M and N).

In accordance with state constitutional provisions, the Reapportionment Commission submitted its Final Plan to the Colorado Supreme Court (Pet. App. N). Respondents Jennie Sanchez and Adeline Sanchez filed an objection to the plan for H.D. 60, claiming that it violated the Voting Rights Act. They offered an alternative district which had not been given to the Commission, and which would have increased Hispanic voting age population to 50.03%[5] (Pet. App. K-24). The Colorado Supreme Court rejected their challenge because Respondents' proposal ignored natural boundaries and split seven counties. The Colorado Supreme Court also found that the Hispanics could not show that they were politically cohesive (Pet. App. K-24 - K-25).

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[4] The ideal House district contains a population of 50,683 persons (Pet. App. K-15 - K-16).

[5] The plan is identical to one of the proposed alternative districts Respondents submitted to the district court in this case (Pet. App. E).

STATEMENT OF THE CASE

On March 30, 1992, the Colorado Supreme Court approved the reapportionment plan for the Colorado General Assembly. *In re Reapportionment of Colorado General Assembly*, 828 P.2d 213 (Colo. 1992).

On May 5, 1993, Respondents filed an action, pursuant to the Voting Rights Act, 42 U.S.C. § 1973, in the federal district court for the district of Colorado, in which they claimed that the configuration of H.D. 60 violated the rights of Hispanics. The trial court, applying the test established in *Thornburg v. Gingles*, 478 U.S. 30 (1986), rejected the claim. It found that Hispanics, as a group, were not sufficiently large or geographically compact in south central Colorado to constitute a majority in a single-member district; that Hispanics were not politically cohesive; and that the non-Hispanic majority did not vote sufficiently as a bloc to enable it to defeat the preferred candidate of Hispanics. The trial court also concluded that Hispanics had not suffered vote dilution and were not deprived of the opportunity to actively participate in the political process.

In analyzing the geographical compactness component, the trial court concluded it must "consider the size and geographic compactness of the minority group within a reasonable alternative district as a benchmark against which to measure the existing district that is being challenged as dilutive" (Pet. App. B-10). The court evaluated traditional districting principles, including contiguity, communities of interest and the integrity of political boundaries, and the effectiveness of political representation (Pet. App. B-12 - B-13). The trial court's analysis of political cohesiveness and legally significant bloc voting by non-Hispanics included an inquiry into "the reasons for, or causes of, voting behavior." (Pet. App. B-21).

The Court of Appeals for the Tenth Circuit reversed and remanded to the trial court to require the State to redraw the boundaries of H.D. 60. The Tenth Circuit rejected each of the trial court's major legal conclusions. In particular, the Tenth Circuit concluded: (1) traditional districting principles and a review of Respondents' alternate district are irrelevant to the compactness analysis (Pet. App. A-23 - A-26); (2) the analysis of bloc voting may not include a review of the reasons for the differing voting patterns of Hispanics and non-Hispanics, and may be limited to election contests in which a non-Hispanic candidate runs against an Hispanic candidate (Pet. App. A-22 and A-30); and (3) factors of racial polarization and electoral success predominate in a court's review of the totality of the circumstances (Pet. App. A-42).[6]

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's analysis violates § 2 of the Voting Rights Act by effectively mandating proportional representation for a legislative body composed of single-member districts. The Tenth Circuit reaches this result by allowing the minority group to propose a district which does not have a benchmark and which is drawn without regard to traditional districting principles. It then permits the minority group to determine political cohesion by using a database which is limited to elections in which candidates of different races or ethnic backgrounds oppose each other, even though this limitation is based on the assumption that persons of a particular race or of a particular ethnic background prefer a candidate of the same race or ethnic background. Finally, it emphasizes minority electoral success and racial polariza-

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[6] The Tenth Circuit also reversed or modified several of the trial court's findings regarding the Senate Report factors.

tion, while de-emphasizing facts relevant to a broad inquiry into the political participation of the minority group.

The Tenth Circuit's analysis is gleaned from a hodge-podge of cases from other circuits and from this Court. The ideas borrowed from other courts were often taken from one context and placed in an entirely different context. The Tenth Circuit was able to cherry-pick concepts from other cases because there is no case which dispositively discusses in detail the application of the Voting Rights Act to single-member legislative districts.

Since 1982, this Court has reviewed § 2 of the Voting Rights Act in six cases. *See Johnson v. De Grandy*, 512 U.S. 997 (1994); *Holder v. Hall*, 512 U.S. 874 (1994); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Growe v. Emison*, 507 U.S. 25 (1993); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986). None of these cases provided the opportunity to the Court to offer detailed guidance to state legislatures which redistrict single-member districts. *Growe* adopted the three preconditions set forth in *Gingles*. However, it did not bridge the analytical chasm between the *Gingles* plurality opinion and Justice O'Connor's concurrence. In particular, the issues of the role of race of the candidate and the weight to be given to factors other than polarization and electoral success in the context of single-member districts have not been resolved.

In *Voinovich v. Quilter*, another single-member district case, the Court did not discuss the *Gingles* factors in detail because the parties agreed that there was no showing of racially polarized voting. In *Johnson v. De Grandy*, the Court focused on the totality of the circumstances and the legal impact of proportional representation. Neither *Chisom v. Roemer* nor *Holder v. Hall* involved single-member districts.

Similarly, the Court's racial gerrymander jurisprudence has not been specifically applied to the preconditions that Respondents must meet in a § 2 challenge. *Bush v. Vera*, 116 S. Ct. 1941 (1996). These cases describe only the relationship between the Fourteenth Amendment and compliance with § 2 and *Gingles*.

As shown below, the concepts and theories of these cases should be applied to a challenge to a single-member district. However, until this Court issues a decision explaining how these factors are to be applied to single-member district challenges, result-oriented decisions, such as the one now before this Court, will be produced.

I. THE TENTH CIRCUIT'S OPINION CONTRAVENES § 2 OF THE VOTING RIGHTS ACT.

A. THE TENTH CIRCUIT'S GEOGRAPHICAL COMPACTNESS TEST CONTRAVENES THIS COURT'S HOLDINGS IN *THORNBURG v. GINGLES*, *HOLDER V. HALL* and *BUSH v. VERA*.

The Tenth Circuit applied a test of geographical compactness which effectively eliminates the geographical compactness precondition established in *Thornburg v. Gingles*, which fails to follow the dictate of *Bush v. Vera* requiring the use of traditional districting principles, and which ignores *Holder v. Hall*, wherein this Court cited the necessity to provide a reasonable benchmark against which a voting practice can be measured.

This Court established the requirement that plaintiffs seeking to advance a § 2 claim must prove that a minority group is sufficiently large and geographically compact to

form a majority in a single-member district. *Thornburg v. Gingles*, 478 U.S. at 50. Although the *Gingles* court adopted no standard test for assessing geographical compactness, it indicated that the size and residential patterns of a minority population should be the focus of the inquiry. *Id.*, at 50 n.17.[7] *Id.* The first *Gingles* precondition requires a "§ 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional district boundaries." *Bush v. Vera*, 116 S. Ct. at 1960.

Minorities groups typically try to meet the geographic compactness requirement by presenting one or more alternative proposed districts. In the instant case, Respondents offered three proposed districts at trial. The trial court used the proposed district principally relied on by Respondents as the benchmark of its geographic compactness analysis (Pet. App. B-10). In concluding that Respondents had failed to show that Hispanics are sufficiently large and geographically compact to form a majority Hispanic district, such that a majority district is feasible, the trial court found that Respondents' proposed district: (1) did not score well on mathematical tests for compactness; (2) split seven counties, three municipalities and several precincts; (3) split an identifiable community of interest; (4) was not contiguous; (5) would reduce the number of political offices held by Hispanics in the San Luis Valley and in adjacent districts; and (6) would impede effective political representation for all Hispanics in south central Colorado (Pet. App. B-14 - B-18).

The Tenth Circuit did not disturb any of these findings. Nonetheless, it reversed the trial court's ultimate finding with respect to compactness. The Tenth Circuit stated that

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[7] The *Gingles* preconditions apply to challenges to single-member districts. *Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

the trial court "misfocused its inquiry," because it "focused only on the shape of the geographical boundaries [of respondents' proposed district] rather than the size and concentration of the minority population." (Pet. App. A-23 - A-24). It held that no benchmark exists in a § 2 case; that the first *Gingles* precondition does not "implicate constitutional principles" (Pet. App. A-18); and that Respondents must only "propos[e] an alternative." (Pet. App. A-24). The Tenth Circuit then found that Respondents had met their burden on the first *Gingles* prong because: (1) the current H.D. 60 has an Hispanic population of 48%;[8] and (2) three of the counties split by Respondents' proposed district contain significant numbers of Hispanic residents (Pet. App. A-24).

The Tenth Circuit left intact the district court's findings that Respondents' district was non-compact and disregarded traditional districting principles. It did not engage in any analysis of the proposed district. Thus, the Tenth Circuit held that the first *Gingles* precondition may be proven by the presentation of a non-compact majority-minority district which ignores traditional districting principles.

If there is no benchmark against which a claim of vote dilution involving a single-member district can be measured, then there can be no violation of § 2. *Holder v. Hall*, 512 U.S. at 881. The sole purpose of the geographical compact-

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[8] The fact recited by the Tenth Circuit is incorrect. As the trial court noted, the current H.D. 60 has an Hispanic VAP of 42.38% and a total Hispanic population of 45.31% (Pet. App. B-2). The Tenth Circuit also noted that the Reapportionment Commission had considered a district which increased Hispanic population to 50.03%. However, the Reapportionment Commission never considered a plan which included a majority Hispanic population.

ness inquiry is to verify the existence of a cognizable injury attributable to the challenged voting procedure. *Thornburg v. Gingles*, 478 U.S. at 51 n.16. If there is no reasonable alternative district, there can be no injury. The mere presentment of an alternative district which is not measured against any objective standard provides no reasonable alternative with respect to this issue. As Justice O'Connor explained, for an electoral system to dilute a minority group's voting power, "there must be an alternative system that would provide greater electoral opportunity to minority voters." *Holder v. Hall*, 512 U.S. at 887 (O'Connor J., concurring in judgment).

The Tenth Circuit assumed that, as long as a proposed district is not bizarrely-shaped, it meets the compactness requirement (Pet. App. A-24 - A-25, A-56). The interpretation is not supported by this Court's holding in *Bush v. Vera*. "If, because of the dispersion of the population a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district." *Bush v. Vera*, 116 S. Ct. at 1961. Any "district drawn in order the satisfy § 2 must not subordinate traditional districting principles." *Id.* Significant deviations from traditional districting principles, including "cutting across pre-existing precinct lines and other natural or traditional divisions," present constitutional issues, insofar as they disrupt "non-racial bases of political identity." *Id.*, at 1962.

By ignoring traditional districting principles, the Tenth Circuit approved of a district which "tells a tale of disparity, not community." *Miller v. Johnson*, 115 S. Ct. 2475, 2484 (1995). It combined two communities -- one an isolated rural, agricultural community, and the other a distant urban community -- with only one common factor: they each have an Hispanic community. This result in unconstitutional.

B. THE TENTH CIRCUIT'S ANALYSIS OF THE SECOND AND THIRD *GINGLES* PRONGS IS TOO NARROW AND LIMITING.

In discussing political cohesion and legally significant white bloc voting, the trial court concluded that it could consider all factors that are "arguably relevant" to a comprehensive assessment of racially polarized voting (Pet. App. B-21). The Tenth Circuit Court disagreed, holding that *Gingles* permits only an examination of "the correlation between the race of the voter and the defeat of the minority's preferred candidate." (Pet. App. A-22). The Tenth Circuit concluded that causation is, at best, a discretionary element, which can be discounted or ignored altogether (Pet. App. A-22).

The standard adopted by the Tenth Circuit reflects the views set forth in the *Gingles* plurality opinion. This position, however, was not adopted by a majority of the *Gingles* court. Five justices clearly rejected such a limited inquiry. Justice White concluded that the legally significant white bloc voting inquiry must address, at least, the role of partisan politics. *Thornburg v. Gingles*, 478 U.S. at 83 (White, J., concurring). Justice O'Connor, writing for three other Justices, believed that an even broader inquiry is necessary: She stated:

> Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates.

Thornburg v. Gingles, 478 U.S. at 99 (O'Connor, J., concurring). Thus, a majority of Justices in *Gingles* rejected the standard adopted by the Tenth Circuit.

The Tenth Circuit's erroneous legal conclusion on this issue led it to ignore virtually all of the statistical and anecdotal evidence that Colorado offered to establish that factors other than ethnicity impacted the electoral success of Hispanics in H.D. 60, including evidence that showed that party affiliation is the primary determinant of voting behavior, and that incumbency and other factors are also relevant.[9] It ignored the fact that in the six contested

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[9] The Tenth Circuit Court also failed to discuss causation in its totality-of-circumstances analysis. Moreover, the Tenth Circuit grossly mischaracterized the results of the State's multivariate analysis, based in part on its reliance on articles written by persons who did not offer expert opinions in this case. Then, based on its erroneous interpretations of the State's evidence, the Tenth Circuit concluded in dicta that the findings "do not appear to be supported by present or historical facts." (Pet. App. A-33 - A-34).

The State's statistical expert analyzed all elections occurring within the boundaries of H.D. 60, including local, county and national contests. His statistical model aggregated the results of all elections analyzed (Pet. App. P-6 - P-8). The results of his analysis led him to reach a number of conclusions about the voting patterns of H.D. 60 voters. One of his conclusions was that partisanship is the primary determinant of voter behavior in this area (Pet. App. P-2, P-8). However, contrary to the Tenth Circuit's statements, neither he, nor the trial court, concluded that partisanship was the sole determinant of H.D. 60 state representative elections. Moreover, the Tenth Circuit's simplistic analysis using party registration data to discredit the role of partisanship in elections assumes that *all* registered voters will vote along party lines and that registered Democratic and Republican

(continued...)

elections for H.D. 60 state representative occurring between 1980 and 1992, Hispanic Democrats have received a greater percentage of votes than non-Hispanic Democrats running against a non-Hispanic Republican incumbent.[10] The lay testimony supported the conclusion that other factors play significant roles.[11]

By failing to consider or properly analyze the abundant evidence in this case, the Tenth Circuit elevated ethnicity to the primary, if not the only, determinant of voting behavior

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[9](...continued)
voters will turn out to vote at the same rates. It ignores entirely the impact of unaffiliated voters, the role of incumbency in H.D. 60 elections, and the responsiveness of the representative.

The Tenth Circuit later tried to discredit the role of incumbency by discussing the results of the 1982 election between Representative Entz and Alex Marquez (Pet. App. A-35 - A-36). However, lay testimony established that Representative Entz, who had served as Alamosa County Commissioner for 18 years, enjoyed great name recognition throughout the San Luis Valley, and that his opponent, Alex Marquez, was a political newcomer (Pet. App. Q). As such, the circumstances surrounding this election are analogous to those elections involving an incumbent.

[10] Prior to the imposition of term limits, 91% of incumbents in Colorado legislative elections were re-elected (Pet. App. R-4).

[11] For example, Avelino Muñiz, the Hispanic Chairperson of the San Luis Valley County Commissioners Association, testified that party affiliation, name recognition and incumbency were major factors in elections within H.D. 60 (Pet. App. S-14 - S-15). Desi Medina, the popularly-elected Hispanic sheriff from Rio Grande County, testified that he was well received by non-Hispanics when campaigning, and that party affiliation and the personality of the candidate were important factors (Pet. App. I-8 - I-10).

in H.D. 60. However, as a majority of justices recognized in *Gingles*, only defeats by voters on account of race are cognizable under § 2. Without an inquiry into all relevant factors, including partisanship and incumbency, which may affect election results, the Tenth Circuit could not discern that election results were "on account of race".

C. THE TENTH CIRCUIT'S TOTALITY-OF-CIRCUMSTANCE ANALYSIS CONTRAVENES *JOHNSON V. DE GRANDY.*

The Tenth Circuit began its totality-of-circumstances analysis by stating, "The Senate Report expands two of *Gingles*' preconditions which adumbrate our review of the totality of circumstances: the existence of racially polarized voting and the extent to which minorities are elected to public office." (Pet. App. A-42). By concluding initially that these factors "predict" the outcome of the totality-of-circumstances analysis, the Tenth Circuit ignored *Johnson v. De Grandy*, 512 U.S. 997 (1994).[12]

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[12] In focusing its inquiry in this manner, the Tenth Circuit relied on a statement made by Justice Brennan in footnote 15 of the *Gingles* plurality opinion, which indicated that electoral success and racial polarization would be more important factors in assessing totality of the circumstances in a multi-member district case. Even assuming that this note can be characterized as a "holding" of the *Gingles* court, it was clearly intended to apply only in the context of multi-member cases, since none of the single-member district cases brought before this Court have discussed it. Moreover, on a number of occasions, this Court has acknowledged that at-large and multi-member districts pose greater threats to minority voter participation than single-member districts. *See Growe v. Emison*, 507 U.S. at 40. Thus, a showing of lack of electoral success and racial polarization in the multi-member or

(continued...)

In *De Grandy*, this Court held that, while minority electoral success rates may provide evidence of vote dilution, the focal point of the totality-of-circumstances inquiry is political opportunity. *Id.* at 1011-12; *see also Chisom v. Roemer*, 501 U.S. 380 (1991) (Plaintiffs seeking to establish vote dilution must establish both lack of opportunity to elect their representatives of choice and lack of opportunity to participate in the political process). "No single statistic provides the Court with a shortcut to determine whether a set of single-member districts unlawfully dilutes majority voting strength. *Johnson v. De Grandy*, 512 U.S. at 1020-21. Rather, "ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id.* at 1011.

The Tenth Circuit's application of a standard that focused on minority electoral success and polarization prevented it from engaging in a "comprehensive canvassing" of all facts relevant to the totality-of-circumstances analysis in this case.[13] By limiting its focus to electoral success, it failed to consider and weigh numerous factors relevant to political participation, including the following: (1) Only since 1982 have Hispanics in the San Luis Valley been united in a single district, and in 1992 the lines of H.D. 60 were drawn to increase Hispanic VAP by over 5%; (2) His-

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[12](...continued)
at-large context presents more compelling evidence of overall vote dilution. *See Johnson v. De Grandy*, 512 U.S. at 1012 (proof of vote dilution is easier in multi-member vote dilution cases).

[13] It emphasized only three facts: An Hispanic surnamed individual has not been elected in H.D. 60 since 1940; the EDS Report; and the fact that the incumbent was re-elected in H.D. 60 in 1992 (Pet. App. A-49, A-51 - A-53).

panics have been appointed to State and local boards, and Hispanics control the Democratic party in most counties within the San Luis Valley and have been successful in nominating candidates of their choice for the H.D. 60 seat; (3) term limits likely will reduce the role of incumbency in H.D. 60 seats;[14] (4) Hispanics are often successful in exogenous elections held within the boundaries of H.D. 60;[15] (5) Hispanic voter registration and political participation has increased over the last twenty years;[16] and (6) partisanship plays a significant role in elections (Pet. App. P-1).

Moreover, the Tenth Circuit improperly analyzed some of the Senate Report factors. One of the most glaring

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[14] In 1990, Colorado enacted a constitutional amendment adopting term limits. The constitutional provision provides legislators' terms are limited "in order to broaden the opportunities for public service and to assure that the general assembly is representative of Colorado citizens." Colo. Const. art. V, § 3(2).

[15] Of 39 local and district elections reviewed by Respondents, Hispanics won 61.5% (Pet. App. P-10).

[16] Non-Hispanic and Hispanic voter registration and turnout rates are roughly equivalent. Respondents acknowledged that Hispanic political participation and socioeconomic standards have improved. In the words of Respondents' historian,

> Hispanics today are better educated, and can be found in all levels of business, government and society. Hispanics are beginning to exert the same strong influence on this state that they did in the early days of Colorado's history. One reason for this is that Colorado Hispanics actively participate in politics.

(Pet. App. U). *See also* Testimony of Jennie Sanchez (Pet. App. V).

examples of the analytical deficiencies in the Tenth Circuit's discussion is reflected in its review of the Senate Report factor examining the extent to which socioeconomic conditions have hindered the ability of Hispanics to participate in the political process. Evidence of depressed socioeconomic conditions is relevant in a vote dilution context only if evidence establishes that such conditions have impacted minority political participation levels. Senate Report at 97-417 at 29 n.114, 1982 USSCAN 117, 207 n.114. The Tenth Circuit found that socioeconomic conditions of Hispanics were worse than those of non-Hispanics. However, the Tenth Circuit did not find any connection between minority participation and lower socioeconomic standards (Pet. App. A-45 - A-47).[17]

The Tenth Circuit also misconstrued the Senate Report factor regarding the policy underlying the State's drawing of H.D. 60. The Tenth Circuit apparently concluded that the policy underlying the creation of H.D. 60 was tenuous, because the state failed to follow the recommendations of EDS. The Tenth Circuit criticized the State for adhering to traditional districting principles in drawing the lines of H.D. 60. It then concluded that the "fairness of the impact" of the State's districting choices was "demonstrated by the 1992 election in which the incumbent was returned to the General Assembly for his sixth consecutive term."[18] The Tenth Circuit did not identify any *practices or procedures* followed by the State in drawing the lines of H.D. 60 which were either tenuous or inconsistently applied throughout the State.

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[17] See n.16.

[18] As noted, the election involved an Hispanic candidate who had no previous political experience in the San Luis Valley. He ran against a multiple-term, popular incumbent who was responsive to the needs of all his constituents, Hispanic and Anglo.

By emphasizing results rather than procedures, the Tenth Circuit made the tenuousness factor indistinguishable from electoral success (Pet. App: A-50 - A-53).[19]

The Tenth Circuit's emphasis on racial polarization and electoral success relegated other, equally-important factors to secondary status. Because the Tenth Circuit's ultimate finding was based on a misreading of the governing law, it must be reversed. *Johnson v. De Grandy*, 512 U.S. at 1022.

II. THE TENTH CIRCUIT'S ANALYSIS OF VOTE DILUTION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Tenth Circuit's vote dilution analysis varies significantly in several key respects from the analysis employed by other circuits.

The Tenth Circuit disregarded traditional districting principles in its analysis of whether Respondents established that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. The Tenth Circuit's failure to analyze Respondents' proposed district in accordance with traditional districting principles is contrary to recent circuit court decisions.[20]

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[19] It is difficult to fault the practices and procedures used by Colorado. Single-member districts are deemed to be the best electoral structures. The nonpartisan, multiethnic commission which proposed the district conducted studies and held numerous public hearings. The final proposal was reviewed by the Colorado Supreme Court.

[20] The Tenth Circuit's failure to establish a benchmark also contravenes the decision in other circuits. It is well-established (continued...)

See, e.g., *Cane v. Worchester Co.*, 35 F.3d 921, 927 n.6 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995) (in drawing proposed district, plaintiffs must adhere to traditional districting principles); *Clark v. Calhoun Co.*, 21 F.3d 92, 96 (5th Cir. 1996) (proposed district should retain a natural sense of community); *Houston v. Lafayette Co.*, 56 F.3d 606 (5th Cir. 1995) (shape of district, as well as concentration of minority population, should be considered).[21]

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[20](...continued)
that the appropriate benchmark in a § 2 challenge is a plaintiff's proposed alternative district. *See Uno v. City of Holyoke*, 72 F.2d 973, 985-86 (1st Cir. 1995); *Houston v. Lafayette Co.*, 51 F.3d 547 (5th Cir. 1995); *Little Rock School Dist. v. Pulaski*, 56 F.3d 904, 911-12 (8th Cir. 1995); *see also Nipper v. Smith*, 39 F.3d 1494, 1530-33 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1795 (1995).

[21] District courts are in accord. *Reed v. Town of Babylon*, 914 F. Supp. 843, 865-68 (E.D.N.Y. 1996) (to satisfy first *Gingles* precondition, plaintiffs must either proffer a districting plan which does not subordinate racial considerations to traditional districting principles, or justify the need for such subordination); *See also NAACP v. Thompson*, 935 F. Supp. 1419, 1424-25 (E.D. Wis. 1996) (recent Supreme Court cases support proposition that a district which departs from traditional districting principles is impermissible under the *Gingles* standard); *Bryant v. Lawrence Co., Miss.*, 876 F. Supp. 122, 125 (S.D. Miss. 1995) (proposed plan which created majority district without consideration of other factors, *i.e.* community of interests fails to meet first *Gingles* precondition because it is not "reasonably compact"); *Jeffers v. Tucker*, 847 F. Supp. 655, 661 (E.D. Ark. 1994) (three-judge court) (satisfaction of first *Gingles* precondition requires that plaintiff's plan comply with traditional districting principles); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1053-55 (D. Md. 1994) (courts must pay attention to both geometric and substantive criteria when testing for compactness under *Gingles*).

The Tenth Circuit also held that factors other than the correlation of race to election outcomes were irrelevant to the determination of the existence of legally significant bloc voting, and that consideration of causation evidence is discretionary. Circuit courts disagree about the stage in the vote dilution inquiry in which analysis of causation evidence is appropriate. However, no recent case has failed to consider causation at some stage of review. For example, the Fifth Circuit has held that evidence regarding the role of partisanship is relevant to the legally significant bloc voting inquiry. *See League of United Latin American Citizens v. Clements*, 999 F.2d 813, 851-61 (5th Cir. 1995) (concluding that legally significant white bloc voting was not established where evidence demonstrated that partisanship best explained voting behavior) *see also Rollins v. Fort Bend Independent School Dist.*, 89 F.3d 1205 (5th Cir. 1996) (observing that evidence derived from a multivariate statistical analysis which permitted comparison of the impact of ethnicity and other factors affecting voting could have helped plaintiffs establish the existence of legally significant white bloc voting).[22] Other courts have concluded that the causation

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[22] Several district courts have reached similar conclusions. *See Reed v. Town of Babylon*, 914 F. Supp at 874-84 (court must determine whether partisanship, rather than race, was the primary determinant of white bloc voting); *Jenkins v. Red Clay Consolidated School Dist.*, 1996 WL 172327 n.2 (D. Del. 1996) (the reasons white voters rejected black candidates is relevant to the third *Gingles* prong); *Little Rock School Dist. v. Pulaski*, 831 F. Supp. 1453, 1466 (E.D. Ark. 1993), *aff'd on other grounds*, 56 F.3d 904 (8th Cir. 1995) (causation evidence is relevant to the third *Gingles* precondition); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 689 (D. Ariz. 1992), *aff'd mem.*, 113 S. Ct. 1573 (1993) (Plaintiffs failed to establish the third *Gingles* factor because evidence showed that Arizonans' voting behavior was closely associated with party affiliation); *Nixon v.*

(continued...)

inquiry is more appropriately discussed in the totality of circumstances analysis. *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 615-16 n.12 (4th Cir. 1996) (best reading of *Gingles* treats causation as relevant to totality of circumstances); *Nipper v. Smith*, 39 F.3d 1494, 1515-17 (11th Cir. 1994) (failure to review other facts creates de facto proportional representation). The Tenth Circuit's decision is the only recent case which has not reviewed causation at any stage.

In analyzing political cohesiveness and legally significant white bloc voting, the Tenth Circuit relied on a statistical analysis which excluded elections which did not involve a majority candidate running against a minority candidate. According to Respondents' statistician, he did not include these elections, "based on the presumption that Hispanic voters prefer Hispanic candidates." (Pet. App. 30).

Two other circuits have recently concluded that evidence derived from such a limited review of elections is facially inadequate to establish the third *Gingles* prong. *Lewis v. Alamance Co.*, 99 F.3d 600, 611 (4th Cir. 1996) (plaintiffs' evidence, which considered only elections in which a black candidate was on the ballot, was insufficient to establish third *Gingles* prong); *SCLC v. Sessions*, 56 F.3d 1281, 1293-94 (11th Cir. 1995) (en banc) (court rejected bivariate regression analysis in which plaintiffs' expert analyzed only elections involving black candidates).

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[22](...continued)
Kent Co., 790 F. Supp. 743, 748 (W.D. Mich. 1992) (in analyzing legally significant white bloc voting, court concluded that race is not the only and perhaps not always the primary determinant of electoral outcomes).

Resolution of these conflicts is important. Courts often look to decisions from other circuits for guidance when deciding voting rights cases. Review by this Court will enhance the likelihood of more uniform decisions.

III. THE CASE PRESENTS IMPORTANT ISSUES WHICH HAVE NOT BEEN DECIDED BY THIS COURT.

A. THIS COURT HAS NOT DECIDED WHETHER EVIDENCE REGARDING RACIAL POLARIZATION MAY BE LIMITED TO ELECTIONS WHICH PIT A MAJORITY CANDIDATE AGAINST A MINORITY CANDIDATE.

The Tenth Circuit accepted as conclusive a statistical analysis which was limited to elections which involved only contests between majority and minority candidates. Respondents' expert presumed that "Hispanic voters prefer Hispanic candidates." Conversely, the expert assumed that a non-Hispanic candidate could never be a candidate of choice of Hispanics. Because the Tenth Circuit rejected Petitioners' expert, it essentially adopted the philosophical underpinning of Respondents' expert.

This Court has not directly addressed this issue. Justice Brennan, in his plurality opinion, concluded that the race of the candidate is irrelevant, *per se*. *Thornburg v. Gingles*, 478 U.S. at 2775. Thus, all election contests, regardless of the race of the candidate, should be considered. Justice White, writing separately, suggested that courts may look to the race of the candidate to determine whether interest group politics explained electoral outcome. Both Justices White and O'Connor believed that the role of the race of the

candidate was not necessary to the disposition of *Thornburg*. *Id.*, at 2783 (White., J., concurring). *Id.*, at 2792 (O'Connor, J., concurring in the judgment).

The implications of the Tenth Circuit's decisions are disturbing. At bottom, the Tenth Circuit accepts the notion that voting decisions are based solely on the color of the candidate's skin or the candidate's ethnic background. It is this stereotyping which this Court has rejected on numerous occasions. *Bush v. Vera*, 116 S. Ct. at 1964. "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Miller v. Johnson*, 115 S. Ct. 2475, 2494 (1995).[23]

Moreover, by limiting the types of elections, it is impossible to know whether the results of Respondents' statistical study accurately measures polarization. *Lewis v. Alamance County*, 99 F.3d at 608. For example, Respondent's analyzed only three endogenous elections (Pet. App. B-30 - B-31). It is difficult, if not impossible, to reach any conclusions about racial polarization with such a limited sample, particularly when other causative factors have been excluded from consideration.

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[23] The fallacy of the assumption is borne out by Respondents' own claims. Mike Salaz is an Hispanic Republican representing an adjacent district. Respondents believed that he was not the Hispanic candidate of choice (Pet. App. B-59).

B. THE TENTH CIRCUIT'S DECISION REINFORCES RACIAL STEREOTYPES, WILL CAUSE ENDLESS LITIGATION AND USURPS THE FUNCTIONS OF THE TRIAL COURT.

The Tenth Circuit has adopted a race or ethnicity-conscious test which will lead to the drawing of election districts along racial or ethnic lines. It achieves this end by eliminating consideration of traditional districting principles, by ignoring all factors independent of race or ethnicity which may effect electoral outcomes, and by limiting the number of elections which are subject to statistical analysis.

The Tenth Circuit's decision will not be limited to one small state house district. Rather, it will provide the framework which states within the circuit will use to guide their redistricting efforts in 2001.

The Tenth Circuit's decision will cause confusion and will lead to endless litigation. At the same time that this Court requires the State to apply traditional districting principles and to engage in a comprehensive analysis of all political and electoral factors to avoid a charge that its redistricting efforts violate the Equal Protection Clause, the Tenth Circuit's analysis will prevent courts, for all practical purposes, from considering these factors and principles in a § 2 challenge. If the Tenth Circuit's analysis stands, all that plaintiffs in a vote dilution case must prove is that they do not have electoral success in a hypothetical district, which may or may not be geographically compact. Once the plaintiffs make this showing, the State would be required to redraw the district, even though there is no proof that a district which complies with traditional districting principles could be drawn. At the remedy phase, there is a likelihood that the State could not draw a district which met traditional districting principles. If this result occurs, the trial court will be faced with two unpalatable options: dismiss the case

because no remedy exists, or draw a district which may be challenged successfully on Equal Protection grounds.

Finally, the Tenth Circuit's usurpation of the fact-finding functions of the trial court sets a dangerous precedent. The Court has not established the boundaries of appellate court review in § 2 cases since the 1982 amendments. The general rule is that a remand by an appellate court to a trial court is proper where the trial court based its conclusions on erroneous legal standards, unless the record permits only one resolution of the factual dispute. *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). *See also Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982) (applying *Pullman-Standard* to pre-1982 voting rights cases). Voting rights act cases require an intensely local appraisal of the contested electoral mechanisms. *Thornburg v. Gingles*, 478 U.S. at 2781.[24] The Tenth Circuit's venture into fact-finding is, in and of itself, cause for reversal.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted.

GALE A. NORTON*
Attorney General

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[24] The need for such local appraisal is evidenced by the Tenth Circuit's finding that "no county in south central Colorado, including the Valley, Pueblo and Trinidad, emerged after the 1992 restricting with an Hispanic voting age majority population." (Pet. App. A-59). First, neither the San Luis Valley nor Trinidad are counties. Second, neither county nor city boundaries are redistricted.

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APPENDIX A

Jennie SANCHEZ, Adeline Sanchez, Debra Casanova, Plaintiffs-Appellants,

v.

The STATE OF COLORADO; Vickie Buckley, in her official capacity as Secretary of State for the State of Colorado, Defendants-Appellees.

The Pueblo Chicano Democratic Caucus, Colorado Hispanic Bar Association, Mexican American Legal Defense and Education Fund, Amici Curiae.

No. 94-1471.

United States Court of Appeals, Tenth Circuit.

Sept. 30, 1996.

* * *

[p. 1305] Before PORFILIO and LOGAN, Circuit Judges; and O'CONNOR, District Judge.[1]

JOHN C. PORFILIO, Circuit Judge.

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[1] Honorable Earl E. O'Connor, Senior District Judge for the United States District Court for the District of Kansas, sitting by designation.

In 1986, the Supreme Court first construed amended § 2 of the Voting Rights Act of 1965 (VRA), Pub.L. No. 89-110, 79 Stat. 437, codified at 42 U.S.C. §§ 1973--1973o, to conclude several North Carolina legislative districts impaired the opportunity of black voters "to participate in the political process and to elect representatives of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); § 2(b); 42 U.S.C. § 1973(b). Thus having launched a decade of challenges to multi-member election districts and at-large election procedures, *Gingles* now presides over a new round of VRA lawsuits involving the configuration of single-member districts, the 1990 census having necessitated redrawing numerous state and congressional districts. In this case, plaintiffs, Jennie Sanchez, Adeline Sanchez, and Debra Casanova, challenged the reconfiguration of their state legislative district, Colorado House District 60 (HD 60), drawn after the 1990 census, contending the resulting single-member district did not provide Hispanic voters in south central Colorado a fair opportunity to elect candidates of their choice. However, the district court de-**[p. 1306]**nied them declaratory and injunctive relief concluding the *Gingles*' quantum of proof was unmet. *Sanchez v. State of Colo.*, 861 F.Supp. 1516 (D.Colo.1994). With the guidance of two recently decided Supreme Court cases, *Bush v. Vera*, --- U.S. ----, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996), and *Shaw v. Hunt*, --- U.S. ----, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*),[2] and *Gingles*' governing principles, we conclude plaintiffs have established under the totality of circumstances the presently configured HD 60 unlawfully dilutes the voting strength of

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[2] Because of the concurrence of oral argument in this case and those the Supreme Court heard, we abated our decision here to await the Court's guidance and permit the parties to address those refinements.

Hispanic voters in south central Colorado. We therefore reverse.

I. Background

Plaintiffs, Jennie Sanchez and Adeline Sanchez, are Hispanic residents and registered voters in Center, Colorado, located in Saguache County. Plaintiff, Debra Casanova, resides in the city of Alamosa, Colorado, in Alamosa County. Saguache and Alamosa along with Conejos, Costilla, Mineral, and Rio Grande Counties comprise the San Luis Valley (the Valley or SLV) in south central Colorado, a flatland whose western boundary is the San Juan Mountains. On its eastern boundary are the Sangre de Cristo Mountains, its peaks towering 14,000 feet, and the La Garita Mountains and Cochetopa Hills overlap to hem in its northern borders. Principally an agricultural area, the Valley encompasses a mosaic of range, pasture, and crop lands and boasts bumper potato harvests, ranking it fifth in potato production nationally. Water issues percolate through all of this economy, the Valley sitting upon one of the nation's largest aquifers, attracting populous urban areas in and out of Colorado which threaten to divert this vital resource to distant paper mills and suburban lawns.

The Valley embraces one of three of Colorado's largest native born Hispanic populations, its Hispanic residents tracing their history back to the original settlement of the Hispano Homeland which comprised extensive Mexican land grants in northern New Mexico and southern Colorado.[3]

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[3] One of the State's experts distinguished her use of the term "Hispano" to reflect the Spanish heritage of many of the Valley's residents. Throughout the record, the terms Mexicano, Hispanic, and Hispano are used interchangeably, and we attach no

Some Hispanic families in the SLV date back to the 1800's when their ancestors first settled there. Although many of these early landowners were later dispossessed of their land, substantial numbers remained in the Valley, lured away to northern cities like Pueblo and Denver when the local agrarian economy failed to provide the wages city jobs offered. Presently, Pueblo and Denver support similarly large, native-born Hispanic populations. Indeed, Hispanics comprise the largest ethnic minority in Colorado, representing 12.5% of its total population. Colorado Vital Statistics 1990, p.18.

In the wake of the decennial federal census, the Colorado Reapportionment Commission (the Commission) was reconvened to redraw the boundaries of state senate and house legislative districts to reflect the 14% increase in the state's population from 2,889,735 to 3,294,394. Operating under Colorado Constitutional mandate[4] and federal law, the

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particularized significance to any use. We shall use the term Hispanic to avoid any confusion.

[4] The Colorado Constitution art. V, § 48(1)(a), requires: "After each federal census of the United States, the senatorial district and representative districts shall be established, revised, or altered, and the members of the senate and the house of representatives apportioned among them, by a Colorado reapportionment commission." Article V, § 46, mandates the state be divided into districts whose populations are "as nearly equal as may be," to preserve the principle of one person one vote. Article V, § 47, provides criteria for drawing districts: prohibiting counties from being divided except to meet the equal population requirements, § 47(2); requiring districts to be drawn as compactly in area as possible with districts composed of contiguous whole general election precincts, § 47(1); and requiring the preservation of communities of interest, including ethnic, cultural, economic, trade area, geographic, and

[p. 1307] politically neutral Commission[5] prioritized the criteria governing their redistricting: first, the equal population of districts with no more than a 5% deviation between the largest and smallest to maintain the principle of one person, one vote; and, second, compliance with the VRA. "Of secondary importance," the Commission's Final Report listed, "are preservation of county boundaries, the preservation of municipal lines, and the formation of compact districts," while "a third level" criterion was the preservation of communities of interest. Of final "unofficial" importance is the preservation of politically competitive districts. Final Report of the Colorado Reapportionment Commission, April 1992, p.4.

In preparation for redistricting, the Commission retained Election Data Services (EDS), a Washington, D.C.-based research and consulting firm which analyses [sic] election behavior, to examine state legislative races to determine "if legally significant racial bloc voting exists and to ascertain the percentage minority population necessary in a district for minority voters to have the opportunity to elect candidates of choice." In its first report, EDS identified two state districts with 40 and 50% Hispanic populations which appeared insufficient to elect minority-preferred candidates, the Weld County area (House Districts 50 and 51); and the southeast, south central part of the state (House Districts 43, 60, and 63). EDS concluded, based on preliminary evidence, "[i]t may be necessary to create districts that have higher concentrations of Hispanics in them in these two areas of the state."

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demographic factors, § 47(3).

[5] Members of the executive, legislative, and judicial branches appointed the eleven members of the Commission which represented five each registered Democrats and Republicans and one unaffiliated voter.

Id. at 6. Subsequently, the Commission requested EDS perform additional racial bloc voting analyses of local elections in each of the counties comprising the Valley except for Mineral County and the surrounding counties, Archuleta, Huerfano, Las Animas, and Prowers.

In its second report to the Commission, EDS observed voting in the Valley "appear[ed] to be racially polarized ... in almost every election contest examined in which a Hispanic candidate competed in 1988 and 1990." Because EDS found in *countywide* elections studied approximately 20% Anglos cross over to vote for the Hispanic preferred candidate, it recommended the State did not have to create super-majority districts to compensate for what otherwise would be completely polarized voting. Consequently, given the slightly lower turnout of minority voters and its finding Hispanic voting cohesiveness, EDS concluded, "[i]t is necessary to create districts that are more heavily Hispanic in the San Luis Valley than elsewhere in the state because of the degree of racially polarized voting found in this area of the state."

Before drafting the final plan, the Commission held hearings throughout the state, in particular, Alamosa, Pueblo, and Trinidad, south central Colorado cities which would be affected by a possible reconfiguration of HD 60. Typical of such localized public fora, a range of opinions voicing hometown and area concerns was aired: whether the Valley should be split; whether the urban interests of Trinidad and Pueblo differed from the Valley's agricultural concerns; and how reconfiguration would impact incumbent representatives to the state legislature. With little disagreement, SLV citizens urged the Commission not to split the Valley after publication of a preliminary redistricting plan proposed splitting the Valley to increase the Hispanic vote. Support from the SLV chapter of the His-

panic League[6] to keep the Valley in one district was, in fact, elicited by the SLV County Commissioner Association which, in return, publicly condemned racial bloc voting in the Valley and resolved to "establish policies that ensure that protected minorities have every opportunity to fully participate in the political process."

Nevertheless, the Valley encompasses only about 80% of the population necessary to comprise a district under Colorado law.[7] **[p. 1308]** The decision then whether to go west or east, whether to include the city of Trinidad with its large Hispanic population, or to carve into part of Pueblo, 40% of whose population is Hispanic, confronted the Commission when it convened on four occasions to weigh the alternative districts proposed for the Valley. Despite the EDS data on racial bloc voting and recommendation to create an Hispanic majority district; the awareness of the lack of success of Hispanic candidates from the SLV seeking election to the state legislature; and the concern about VRA liability, the Commission ultimately adopted the alternative which neither split the Valley nor touched Trinidad or Pueblo, preserving the incumbents' seats,[8] and added part

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[6] The Hispanic League is a statewide organization which advocates issues important to Hispanics.

[7] Indeed, only in 1982 were the Valley's counties first contained in a single state legislative district. For example, in the 1968 and 1970 elections, the Valley was split among four districts with Alamosa and Pueblo combined with Huerfano County in one district. Historically, the Valley had also been joined to the city of Gunnison, Colorado, on the western side of the Continental Divide in Gunnison County.

[8] In contrast, the proposed Ventura Plan, which would increase the Hispanic voting age population to 50.03%, would have placed Representative Mike Salaz, an Hispanic Republican

of Las Animas and all of Huerfano Counties. Except for Las Animas County, no counties are split. However, the Continental Divide slices through HD 60's western boundary, placing part of Mineral and Saguache Counties on the Divide's western slope, while Las Animas and Huerfano Counties sit on the eastern side of the Sangre de Cristo Mountains. Of the estimated 45.41% Hispanic population in the resulting HD 60, 42.38% comprise the Hispanic voting age population, a 5% increase in Hispanic voters from the prior HD 60. After this redistricting, voters in HD 60 reelected Lewis Entz, the incumbent Anglo representative, to the state legislature in 1992, maintaining the Anglo control of this seat that has existed since 1940.

Various objectors, including plaintiffs in this action, challenged the Final Plan in the Colorado Supreme Court. However, although it agreed with certain objections and remanded for corrections, the Colorado Supreme Court concluded the Final Plan satisfied constitutional criteria. *In re Colorado General Assembly*, 828 P.2d 185 (Colo.1992).[9]

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from Trinidad, HD 47, in the same district with Lewis Entz, an Anglo Republican, who has represented HD 60 since 1982.

[9] Writing separately, Justice Quinn asserted,

> I agree with the proposition that the most important criteria for evaluating a reapportionment plan are the United States Constitution, particularly the Fourteenth and Fifteenth Amendments, and the Voting Rights Act of 1965. This court's role in evaluating a claim under § 2 of the Voting Rights Act, however, is extremely limited due to the nature of the record before us. That record was not developed in an adversarial proceeding, nor was the factual basis for the reapportionment plan subjected to sworn testimony or the crucible of cross-examination. Because a Voting Rights Act claim

Subsequently, plaintiffs filed this lawsuit against the state of Colorado, members of the Commission, and other state officials (the State, collectively) challenging the legality of HD 60 under § 2 of the VRA. They alleged the 1992 configuration of HD 60 disenfranchised Hispanic voters by permitting the white majority to vote as a bloc to defeat Hispanic-preferred candidates. Alleging Hispanic voters in the area constitute a sufficiently compact population and are politically cohesive, plaintiffs asked the district court to declare HD 60 violates § 2; permanently enjoin the State from conducting further elections for representative to the Colorado General Assembly from HD 60; and order the creation of a new HD 60 to protect Hispanic rights under § 2. After a five-day trial to the court, the district court concluded plaintiffs failed to establish *Gingles*' three preconditions and did not demonstrate based on a totality of circumstances HD 60 violates § 2(b). We address the rudiments of this conclusion in abecedarian order.

II. Standard of Review

[1-33] *Gingles* not only furnishes the substantive basis for review of cases under the VRA but also clarifies the proper standard of **[p. 1309]** appellate review. Generally, the Court advises treating "the ultimate finding of vote

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> requires a fact-specific record that can only be adequately developed in the procedural and evidentiary framework of an adversarial proceeding, I do not consider this court's resolution of those claims preclusive of a challenge to the reapportionment plan in a formal adversarial proceeding initiated under the Voting Rights Act.

In re Colorado General Assembly, 828 P.2d 185, 205 (Colo.1992) (Quinn, J., concurring in part and dissenting in part).

dilution as a question of fact subject to the clearly-erroneous standard of Rule 52(a)." *Gingles*, 478 U.S. at 78, 106 S.Ct. at 2780. That is, we shall not disturb this finding unless there is no evidence in the record to support it; or, if there is some evidence substantiating it, we are, nevertheless, after reviewing all the evidence "left with a definite and firm conviction that a mistake has been made." *Zimmerman v. Sloss Equip., Inc.*, 72 F.3d 822, 825 (10th Cir.1995) (citations omitted). However formidable a standard, *Uno v. City of Holyoke*, 72 F.3d 973, 978 (1st Cir.1995), it is not insurmountable, as *Gingles* counsels, for it "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Gingles*, 478 U.S. at 79, 106 S.Ct. at 2781 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501, 104 S.Ct. 1949, 1960, 80 L.Ed.2d 502 (1984)). Subjecting the trial court's legal analysis to plenary review "assures the appropriate legal standards are applied," *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1117 (3d Cir.1993), *cert. denied*, --- U.S. ----, 114 S.Ct. 2779, 129 L.Ed.2d 891 (1994), balances the trial court's "intensely local appraisal" of these fact-intensive cases, and best "preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Gingles*, 478 U.S. at 79, 106 S.Ct. at 2781. Thus, while we do not defer to an erroneous interpretation of the law, neither will we substitute our view of the evidence for the alternative choice the fact-finder made. *Sanchez v. Bond*, 875 F.2d 1488, 1495 (10th Cir.1989) (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985)), *cert. denied*, 498 U.S. 937, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990).

III. Section 2 of the VRA

As amended, § 2(a), 42 U.S.C. § 1973(a), declares:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2)[10] of this title, as provided in subsection (b) of this section.

After the Supreme Court later interpreted § 2 to require plaintiffs prove the contested electoral practice was intentionally adopted and maintained by state officials for a discriminatory purpose, *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), Congress amended its language, codifying the "results tests" which the courts had applied before *Bolden*, and clarifying that plaintiffs need only prove the contested practice has a discriminatory effect. This amendment, § 2(b), reads:

> A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision

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[10] 42 U.S.C. § 1973b(f)(2) states:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b). As enacted, Section 2(b) promises protected minorities an even playing field, not a certain victory.

[p. 1310] [4] The Senate Report accompanying the 1982 amendments elaborates the proof for a § 2 violation, specifying a "variety of relevant factors, depending upon the kind of rule, practice, or procedure called into question." S.Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.[11] The Senate

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[11] The Senate Report states:

> Typical factors include:
>
> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been **28. denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Report added that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Id. at 207. Moreover, "[w]hile the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered." *Gingles*, 478 U.S. at 45, 106 S.Ct. at 2763 (citation omitted) (footnote omitted). Most importantly, "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process." *Id.* (quoting S.Rep. No. 417, 1982 U.S.C.C.A.N. 177, 208). The lack of electoral *opportunity* is the key. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47, 106 S.Ct. at 2764.

IV. *Gingles* and its Progeny

[5] *Gingles* shorthands the totality of circumstances proof provided in the Senate Report recognizing "the conjunction" of three circumstances which, as preconditions,

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While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.

The Senate Report states the factors are taken from the analytical framework expressed in White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), as articulated by a Fifth Circuit case, *Zimmer v. McKeithen*, 485 F.2d 1297 (1973) (en banc), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976).

must be present to establish a vote dilution claim. Indeed, their presence creates the inference the challenged practice is discriminatory. First, minority plaintiffs must prove their group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50, 106 S.Ct. at 2766. Second, plaintiffs must show the minority group is "politically cohesive." *Id.* at 51, 106 S.Ct. at 2766. Third, they must demonstrate "the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed--usually to defeat the minority's preferred candidate." *Id.* While these three conditions are necessary to establish a vote dilution claim, they are not sufficient. *Johnson v. De Grandy*, --- U.S. ----, ----, 114 S.Ct. 2647, 2657, 129 L.Ed.2d 775 (1994).

Under *De Grandy*, a court's examination of relevant circumstances is not complete **[p. 1311]** "once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *Id.* This is so "because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id.* Failure to prove the totality of circumstances establishes the minority is not harmed by the challenged practice and rebuts the inference of discrimination arising from proof of the three preconditions. *Uno*, 72 F.3d at 980. In *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), the Court expressly applied the *Gingles'* paradigm to a vote dilution claim against a single member district.

A. "Sufficiently large and geographically compact"

The first question, whether the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," simply asks whether any remedy is possible in the first instance. As *Gingles* noted:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17 (emphasis in original). As a corollary, if the minority group is small and dispersed, no single member district could be created to remedy its grievance.

Hence, the first prerequisite asks about "the existence of a legally cognizable injury." *NAACP, Inc. v. City of Niagara Falls*, N.Y., 65 F.3d 1002, 1011 (2d Cir.1995). As such, this element of proof assists a court in finding "a reasonable alternative practice as a benchmark against which to measure the existing voting practice." *Holder v. Hall*, --- U.S. ----, ----, 114 S.Ct. 2581, 2585, 129 L.Ed.2d 687 (1994).[12] "The inquiries into remedy and liability,

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[12] In *Holder v. Hall*, --- U.S. ----, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994), Justice Kennedy delineated the different inquiries under § 5 and § 2 of the VRA, distinctions which should be kept in mind in evaluating this § 2 case, especially after the

therefore, cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system." *Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir.1994), *cert. denied*, --- U.S. ----, 115 S.Ct. 1795, 131 L.Ed.2d 723 (1995).

Because *Gingles* advances a functional evaluation of whether the minority population is large enough to form a district in the first instance, the Circuits have been flexible in assessing the showing made for this precondition.

> The first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the black population be sufficiently compact to constitute a majority in a single-member district. Moreover, plaintiffs' proposed district is not cast in stone. It was simply presented to demonstrate that a majority-black district is feasible.... If a § 2 violation is found, the county will be given the first opportunity to develop a remedial plan.

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recent discussions in *Shaw v. Hunt*, --- U.S. ----, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*), and *Bush v. Vera*, --- U.S. ----, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996). Noting the two sections differ in structure, purpose, and application, Justice Kennedy distinguished, "[u]nder § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change. The baseline for comparison is present by definition; it is the existing status." --- U.S. at ----, 114 S.Ct. at 2587 (citation omitted). Because retrogression is not the inquiry in a § 2 case, "a benchmark does not exist by definition in § 2 dilution cases." *Id*. For example, in *Holder*, plaintiffs unsuccessfully challenged the size of a district under § 2 claiming it diluted the minority's vote.

Clark v. Calhoun County, Miss., 21 F.3d 92, 95 (5th Cir.1994) (citations omitted); *see also Houston v. Lafayette County, Miss.*, 56 F.3d 606, 611 (5th Cir.1995) ("Compactness is not **[p. 1312]** as narrow a standard as the district court construed it to be.").

[6] Geographical compactness, then, does not implicate constitutional principles. "The Constitution does not mandate regularity of district shape," the Court recently stated in *Bush v. Vera*, --- U.S. at ----, 116 S.Ct. at 1953 (citing *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 2826-27, 125 L.Ed.2d 511 (1993)) (*Shaw I*). Instead, Justice Kennedy clarified, "The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district." *Id.* at ----, 116 S.Ct. at 1971, (Kennedy, J., concurring). Stating the concept in a different way, we must determine whether the affected minority is diffused and thus politically ineffective, not whether the area by which it is bound is geographically dense.

Nevertheless, as we shall see in this case, and as demonstrated recently in *Shaw II* and *Bush*, "compactness is the conceptual point at which the tension between the traditional American commitment to territorial districting and the VRA concern for fair representation of group interests must be resolved." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election District Appearances after Shaw v. Reno*, 92 Mich. L.Rev. 483, 535 (1993) [hereinafter *Expressive Harms*]. And, as *Shaw I* warned, "appearances do matter," 509 U.S. at 647, 113 S.Ct. at 2827, triggering, as they do, Fourteenth Amendment equal protection scrutiny.

B. Politically Cohesive

That the minority group demonstrates it is politically cohesive embodies a similarly functional focus. "If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766. Like the first *Gingles*' precondition, however, the Court does not expressly define political cohesiveness. Other courts have elaborated.

In *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir.1988), *cert. denied*, 489 U.S. 1080, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989), the Ninth Circuit observed, "[t]he inquiry is essentially whether the minority group has expressed clear political preferences that are distinct from those of the majority." Thus, we judge political cohesiveness by looking at the "voting preferences expressed in actual elections." *Id.* Necessarily, when we examine the evidence of political cohesiveness as voting preferences, we look to the same statistical evidence plaintiffs must offer to establish vote polarization.[13] Indeed, political cohesiveness is implicit in racially polarized voting.[14]

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[13] To the extent *Sanchez v. Bond*, 875 F.2d 1488, 1493-94 (10th Cir.1989), has been read to conclude that statistical evidence is secondary to anecdotal testimony on political cohesiveness, those readings are overstated. *Bond* simply stands for the proposition that *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), does not preclude the district court from considering such testimony.

[14] *Gingles* stated that one purpose of determining the existence of racially polarized voting is "to ascertain whether minority group members constitute a politically cohesive unit...." 478 U.S. at 56, 106 S.Ct. at 2769.

C. Racial Bloc Voting

Gingles adopted a straightforward definition of racial bloc voting provided by the expert witness upon whom the district court had relied. Racial polarization or bloc voting "exists where there is a consistent relationship between the race of the voter and the way in which the voter votes ... or to put it differently, where black voters and white voters vote differently." 478 U.S. at 53 n. 21, 106 S.Ct. at 2768 n. 21 (internal quotation marks omitted). The Court's focus was twofold: to determine whether the minority group votes cohesively and "whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769. The extent to which this bloc voting impairs the minority's ability to elect candidates of their choice, however, must be "legally significant," a sliding scale that varies with the district and a variety of factual circumstances **[p. 1313]** and may emerge more distinctly over a period of time. *Id.* While the Court offered no "simple doctrinal test for the existence of legally significant racial bloc voting," *id.* at 58, 106 S.Ct. at 2770, it urged a flexible approach, noting that the isolated success of a minority candidate in a district that usually exhibits vote polarization will not alone negate plaintiffs' showing. Thus, while legally significant white bloc voting enables the majority "in the ordinary course, to trounce minority-preferred candidates most of the time," its presence may be more subtle requiring close inquiry over time. *Uno*, 72 F.3d at 980 (citing *Voinovich v. Quilter*, 507 U.S. 146, 156, 113 S.Ct. 1149, 1156-57, 122 L.Ed.2d 500 (1993)).

To determine whether racial bias, in fact, motivated the targeted voting practice, the Court accepted the statistical method necessarily inhered to the definition of racial bloc voting. In *Gingles*, the district court had relied on expert testimony offered by Dr. Bernard Grofman, who used two

methods of analysis of voting patterns, "bivariate ecological regression analysis" and "homogeneous precinct analysis," also called "extreme case analysis." Bivariate ecological regression analysis "determines the degree of relationship between two variables--here the relationship between the racial composition in each political unit (the independent variable) and the support provided a particular candidate within that political unit (the dependent variable)." *Jenkins*, 4 F.3d at 1119 n. 10. In an ecological regression analysis, the correlation coefficient shows which data points fall on the straight line. The linear relationship created by the two variables ideally then will pack closely together on a line. Extreme case analysis examines the actual voting percentages received by candidates in racially homogeneous precincts. The inferences that arise from the latter analysis are often graphically demonstrated by the former statistical method, the latter providing actual results to demonstrate the estimates. While homogeneous precinct analysis may be a useful check on ecological regression analysis, neither method is without disadvantage, and each, like all statistical evidence, is subject to interpretation.[15]

However, while the Supreme Court approved the statistical proof provided by bivariate ecological regression and homogeneous precinct analysis, it did not expressly preclude

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[15] We are wary of the interplay between these statistical proofs arising as they do from disciplines foreign to the methodology of the bench and our usual approach to judicial resolutions. "This concern has grown with the realization that the esoterics of econometrics and statistics which both parties have required this court to judge have a centripetal dynamic of their own. They push from the outside roles of tools for 'judicial' decisions toward the core of decision making itself." *In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir.1990) (citation omitted). Without the exercise of care, these esoterica could transfer the decisional process from the courts to social scientists.

other methods of establishing the presence of racial bloc voting. Nevertheless, if the third *Gingles*' precondition asks whether whites vote sufficiently as a bloc to enable them usually to defeat the minority candidate, it is asking *how* voters vote, not *why* voters voted that way. Indeed, the searching evaluation done in the totality of circumstances perhaps reveals the answer to the latter question. However, at the threshold, we are simply looking for proof of the correlation between the race of the voter and the defeat of the minority's preferred candidate. We do not, therefore, reject multivariate regression analysis but prefer to reserve its use, if at all, to the more global picture plaintiffs must establish.

V. The Focus

Before addressing the district court's order, we must reiterate our focus in this case. Plaintiffs contend the *current* district violates their *federal* rights guaranteed by the VRA to have a fair opportunity to elect candidates of their choice. While that question predominates our review, it is not exclusively answered by federal law because the Colorado Constitution and state law furnish those "traditional districting principles" of which the Court so frequently speaks. *Bush*, --- U.S. at ----, 116 S.Ct. at 1952. Even in its most recent opinions, the Court reminded, "we adhere to our longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its **[p. 1314]** redistricting plan." *Id.* at ---- - ----, 116 S.Ct. at 1960-61 (citation omitted). "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe*, 507 U.S. at 34, 113 S.Ct. at 1081, citing U.S. Const. art. I, § 2. Given these principles, however, we must gingerly look to federal law to assure the equality of each vote

because achieving "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." *Reynolds v. Sims*, 377 U.S. 533, 565-66, 84 S.Ct. 1362, 1383, 12 L.Ed.2d 506 (1964). Just as the Court has affirmed its unfailing championship of the Fourteenth and Fifteenth Amendments in *Shaw II* and *Bush*, it has also declared the constitutionality of § 2 of the VRA, observing, "it would be irresponsible for a State to disregard the § 2 results test." *Bush*, --- U.S. at ----, 116 S.Ct. at 1969. (O'Connor, J. concurring, joined by Stevens, Ginsburg, Breyer, Souter, JJ.).

VI. District Court's Application of *Gingles*

In posing the first *Gingles*' question, the district court misfocused its inquiry. It asked, "Is the Hispanic population sufficiently large and geographically compact to constitute a majority in the *Plaintiffs*' proposed H.D. 60?" 861 F.Supp. at 1524 (italics added). The district court proceeded to answer its question, looking to facts about the geographical uniqueness of the Valley, its agri-industries, and cities. Against these facts and the various mathematical tests used to determine compactness, the court concluded, based on "principles of contiguity, preservation of communities of interest, and minimizing the splitting of counties and municipalities, the proposed alternative H.D. 60 is not compact." *Id.* at 1525. It found plaintiffs' alternative split too many counties, was not contiguous, would "erode the number of political offices held by Hispanics in the Valley and in the adjacent districts," and burden representatives attempting to visit such a "large, geographically dispersed district." *Id.* We have no quarrel with any of these findings. However, they do not address whether plaintiffs have established the minority group is "sufficiently large and

geographically compact to constitute a majority in a single-member district." 478 U.S. at 50, 106 S.Ct. at 2766.

[9] As we have noted, satisfaction of the first precondition requires plaintiffs show a majority-Hispanic district is feasible; a remedy is possible. The evidence surely established the Hispanic population is "sufficiently large," the current district including 48.82% Hispanic population. Under Justice Kennedy's definition, the Hispanic population is also compact; for example, representing as much as 76.8% of Costilla County and at least 40% of both Alamosa and Rio Grande Counties. Nonetheless, as stated, the Valley alone does not contain sufficient population to satisfy the federal requirement of one person, one vote. In judging plaintiffs' proposed alternative, which necessarily had to exceed the Valley's bounds, the district court focused only on the shape of the geographical boundaries rather than the size and concentration of the minority population. *Houston v. Lafayette County, Miss.*, 56 F.3d at 611.

When plaintiffs *proposed* an alternative, *Gingles* required no more. While that proposal splits more counties and two cities, much of its irregularity results from its maintaining the integrity of precinct lines throughout and observing natural boundaries created by the region's geography. Even under the Colorado Constitution, compactness is not a fixed principle, but a measure of combining like regions and natural boundaries in the shortest aggregate linear distance. Colo. Const. art. V, § 47(1).[16] Indeed, the Commission crafted HD 7, which includes the city of Denver extended eastward to wrap around Denver Interna-

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[16] The State's witness, Terry Elmore, director of the Reapportionment Project, explained the various measures the State used to draw compact districts, agreeing there is no absolute measure of compactness, but only relative measures.

tional Airport with no "aesthetic ideal" in mind. *Clark*, 21 F.3d at 95. Nevertheless, plaintiffs, with minimal time on the State's computer used to draw districts, provided a feasi-**[p. 1315]**ble alternative.[17] Under *Gingles*, plaintiffs satisfied their burden by showing that feasibility. Drawing the necessary district is not their onus, because the State must be given the first opportunity to fashion a remedy. *Id.*[18]

We would also note by comparison to the districts the Court recently found "bizarre" in *Shaw II* and *Bush*, plaintiffs' proposed district is non-objectionable. Again, as Justice Kennedy distinguished, there is no benchmark here against which the proposed alternative district may be measured. Instead, the plaintiffs have demonstrated, as the evidence established, the Hispanic population is sufficiently large and compact to indicate the *possibility* of a remedy. Notwithstanding the conceptual burdens invested in the analysis, the district court's interpretation of this precondition unfortunately mischaracterized plaintiffs' burden and incorporated considerations and attributes to the requirement that are irrelevant to the inquiry. That is, while compact districting may "facilitate the representation of political communities," *Expressive Harms* at 501, and we recognize the role of communities of interest in the districting process, at this stage, the district court overburdened plaintiffs'

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[17] In response to the court's question, plaintiffs' expert, Dr. Robert Bardwell, stated the map was basically a computer analysis of how the district could be drawn by population alone, the effort aimed at showing the "possibility of drawing a district not to come up with a proposed plan."

[18] We would note the Commission, without objections over compactness or contiguity, considered alternative plans, one of which increased the Hispanic majority in HD 60 to 50.03%.

showing with concerns better left for its later analysis. This misdirected view of the law led the district court to erroneously find plaintiffs failed to meet their burden of proving the first *Gingles*' precondition.

VII. Political Cohesiveness and Racial Bloc Voting

[10] The district court essentially collapsed these two preconditions, intertwining observations about whether Hispanics vote cohesively on some issues with general observations about racial bloc voting. However, as we have stated, both inquiries are rooted in the same statistical evidence offered to show minorities "have expressed clear political preferences." *Gomez*, 863 F.2d at 1415. We therefore do not fault the conjunctive approach. However, the heart of each inquiry requires a searching look into the statistical evidence to discern the way voters voted. Missing this essential inquiry, the district court chose instead to examine plaintiffs' evidence and superimpose its view of "the reasons for, or causes of, voting behavior." *Sanchez*, 861 F.Supp. at 1527. Regrettably, those reasons are not relevant at this point.

Without expressly addressing any of plaintiffs' statistical evidence, the district court rejected bivariate ecological regression and homogeneous precinct analyses and embraced the State's proof based on multivariate regression analysis, "a statistical method that helps determine whether one variable--here race--makes an 'independent' contribution to voting decisions once other factors such as newspaper endorsements, incumbency, campaign spending, and the socioeconomic characteristics of the voters are taken into account." *See* Bernard Grofman, Lisa Handley, & Richard G. Niemi, Minority Representation and the Quest for Voting

Equality 83 (1992). In this case, the variable of interest the State's expert selected was the percent of Democratic vote share judged against over forty other variables. In contrast, the bivariate ecological regression analysis presented to the district court used only two variables of interest: the percentage vote for the Hispanic candidate tracked along a vertical axis with the percentage of Hispanic voting age population appearing on the horizontal axis.

To us who are statistics neophytes, bivariate ecological regression analysis identifies the differences while multivariate regression analysis explains the differences. *Id.* at 100.[19] However, "[t]he legal standard for the **[p. 1316]** existence of racially polarized voting looks only to the difference between how majority votes and minority votes were cast; it does not ask why those votes were cast the way they were nor whether there were other factors present in contested elections, such as 'white backlash.' " *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 935 (4th Cir.1987).

Despite these differences, the district court cited no basis in the evidence to validate the use of either methodology or square that evidence with the proper legal focus. Although the court stated it would "not restrict its examination to Dr. Bardwell's bivariate analysis, but will

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[19] As Dr. Grofman, who analyzed plaintiffs' data in *Gingles*, explained, "At least in those situations involving only two groups, for example blacks and nonblacks or Hispanics and nonHispanics, the methods that are appropriate for estimating the extent of racial bloc voting are bivariate methods intended to *identify* differences in the two groups' voting behavior, rather than multivariate methods that attempt to *explain* voting differences." Bernard Grofman, Lisa Handley, & Richard G. Niemi, Minority Representation and the Quest for Voting Equality 83, 100 (1992) (italics in original).

also consider Dr. Zax's multivariate analysis," 861 F.Supp. at 1527, its conclusions made no reference to plaintiffs' statistical proof[20] and did not address with any specificity the State's statistical evidence. Although the court referenced lay testimony figuring into its conclusion, it neither identified the lay witnesses nor examined how their testimony established, without more, the absence of racial bloc voting. Instead, in general, the court found "substantial evidence that many factors influence voting behavior and electoral success in H.D. 60." *Id.*[21]

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[20] Under its totality of circumstances review, the district court concluded ethnicity was only one of many factors influencing why voters vote and took "into account the problems with Dr. Bardwell's bivariate analysis (overly restrictive bivariate analysis, statistical bias, use of 1990 census data, type of races analyzed too narrowly defined, use of absentee ballots, underestimated impact of white crossover votes, failure to consider impact on adjacent districts, and the occurrence of impossible estimates, among others)...." *Sanchez v. State of Colo.*, 861 F.Supp. 1516, 1527 (D.Colo.1994). The criticism came directly from the State's expert's critique, and, absent the district court's addressing the statistical evidence or methodology, in the first instance, lacks meaning. Further, the court did not address the techniques Dr. Bardwell testified he utilized to verify the results of his analysis or his reflection that voting analysis is at best an inexact science.

[21] The district court stated:

> The following factors have influenced voting patterns in H.D. 60: (1) party affiliation of the candidate; (2) incumbency of the candidate; (3) the candidate's track record, if any, in political office; (4) the candidate's platform; (5) the candidate's name recognition in the Valley; (6) campaign strategy; (7) campaign finances; (8) effort put into campaigning and time spent campaigning door-to-door; (9) personal characteristics of the candidate, including qualifications, reputation,

At this juncture, it bears reminding Fed.R.Civ.P. 52(a) requires the district court, sitting without a jury, to "find the facts specially." That must be the premise of our clearly erroneous appellate review. Broad and general findings, not explicitly tethered to any particular testimony--especially in the VRA context which demands penetrating case by case, fact bound analysis--simply do not provide the foundation for proper appellate review. Thus, as the court stated in *Teague v. Attala County, Miss.*, 17 F.3d 796, 798 (5th Cir.1994), "in making its intensely fact-specific inquiry here, the district court ought to have discussed appellants' statistical evidence more thoroughly because that was the principal evidence they offered and because their statistics had at least surface plausibility." In this case, the district court did not even address plaintiffs' statistical proof, leaving us little basis for review.

In that absence, we till the same ground. Dr. Bardwell testified he aimed his analysis to address the question whether there is legally significant racial bloc voting in HD 60. To that end, he explained he used a two equation method for ecological regression analysis and a one equation method for the scatter plots.[22] This methodology mirrored EDS's although Dr. Bardwell stated he analyzed more

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> speaking ability, residence, family ties, gender, personal popularity, *ethnicity*, and visibility in the community; (10) identification of the candidate with past political scandals; and (11) the voter's *ethnicity*.

861 F.Supp. at 1527 (italics added).

[22] Dr. Bardwell testified to create the scatter plots, he used a statistical package called SAS, demographic data from the 1990 census, and the abstracted votes provided by the counties.

elections in the targeted counties. [p. 1317] Like EDS,[23] he did not include elections in which an Anglo candidate opposed an Anglo candidate based on the presumption Hispanic voters prefer Hispanic candidates.[24] In all, he analyzed 53 elections, 46 of which, he testified, evidenced statistically significant polarization. He included the elections for HD 60 representative, primary elections,[25] and exogenous elections incorporating the proposed alternative district to examine Hispanic cohesiveness in these non-

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[23] Dr. Bardwell attributed the minor differences between his results and those of EDS to his including absentee votes as a separate precinct and the slight variations in election data.

[24] Dr. Bardwell likened the "choice" the minority is given in the Anglo versus Anglo races to the Henry Ford adage in which Mr. Ford apparently offered customers cars painted any color they wanted as long as they were black. Thus, because he was looking for evidence of racial bloc voting, Dr. Bardwell testified he only included minority/majority races to assure the *Gingles'* focus on an *opportunity*. Similarly, he excluded Hispanic/Hispanic elections.

[25] Although the State's expert criticized Dr. Bardwell's work for including analyses of primary elections on the ground the low voter turnout undercut any exemplary meaning for these races, we believe the district court should consider this evidence. If "Democrats" are pitted against "Democrats" in a primary contest, removing the partisanship factor, one remaining variable in an ecological regression analysis would be ethnicity. In heavily Anglo precincts, Anglo candidates received the Democrat vote over the Hispanic primary candidate. Thus, these elections would seem facially probative of racial bloc voting and bear on the argument Hispanics don't lose elections, Democrats do.

coincidental jurisdictions.[26] His studies concluded in the proposed alternative district, Hispanics voted cohesively.

Of greatest interest are his results for the 1980, 1982, and 1992 elections for HD 60 representative to the Colorado General Assembly. In those "endogenous" races, that is, elections involving the legislative seats on which plaintiffs premise their vote dilution claim, the correlation coefficients, how the data points fall on a line, are 0.83%, 0.88%, and 0.82%, graphically demonstrating on the scatter plots the high correlation between the voter's ethnicity and vote for the Hispanic candidate of choice.[27] This analysis revealed 86% Hispanic cohesiveness for the 1980 HD 60 election and 84% Anglo bloc vote; 89% Hispanic cohesiveness in 1982 and 90% Anglo bloc vote; and, in 1992, 89% Hispanic cohesiveness and 83% Anglo bloc vote. Homogeneous precinct analysis largely replicated this graphic picture. A similar analysis done for both the election of then Democrat Ben Nighthorse Campbell, a Native American who ran for the United States Senate in 1992, and for the 1988 Amendment 1 ballot initiative declaring English the official language of Colorado also mirrored this pattern of Hispanic political cohesiveness in HD 60 and its expanded borders.[28]

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[26] These exogenous elections evidenced slightly lower levels of polarization than those displayed in HD 60.

[27] The values of the correlation coefficient "can range from + 1.0 (a perfectly consistent positive relationship) through 0.0 (no relationship) to--1.0 (a perfectly consistent negative relationship)." (internal quotes omitted) (citations omitted).

[28] Dr. Bardwell also studied "exogenous" elections, those occurring outside or overlapping HD 60 and involving different local offices or adjacent district seats in the General Assembly. He explained evidence of possible racial bloc voting in those races would also assist in ultimately drawing new boundaries for HD 60.

For all of the elections studied, Dr. Bardwell found a mean cohesiveness among Hispanic voters of 83% and among Anglos of 71%. Consequently, Dr. Bardwell concluded these figures established "a particularly high level of polarization."[29]

Dr. Bardwell testified his figures for the white crossover vote were slightly lower than those generated by EDS' studies: he calculated an Anglo crossover vote between 10--17% while EDS, which studied fewer elections, determined a 20% Anglo crossover vote. However, he also observed a predictable Hispanic crossover vote that ranged be-**[p. 1318]**tween 11--14% counterbalanced the Anglo crossover vote. Because of the virtual neutralization of the crossover vote demonstrating equal polarization, Dr. Bardwell concluded a majority district is necessary to give Hispanics the opportunity to elect candidates of their choice.

In contrast, the State's expert, Dr. Jeffrey Zax, testified his goal was to understand why in five counties with Hispanic voting age populations slightly under 40%, there is dramatic variation in the success of Hispanic candidates. Consequently, his focus was to account for the *difference in the rate of minority success* "explained by something other than the percent of Hispanics." To that end, he utilized the methodology of multivariate regression analysis, believing that voting behavior is a construct of complex factors. His analysis produced five conclusions: (1) heavily Hispanic

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[29] The calculations for other endogenous and exogenous elections studied were similarly dramatic despite the presence of certain discrete races, which Dr. Bardwell called "outliers," a statistical observation that did not fit this or seemingly any pattern. However, *Gingles* doesn't require perfect uniformity of result. That plaintiffs' figures presented a pattern of racial bloc voting over time is probative of *Gingles* ' second and third preconditions.

precincts vote more heavily for Democratic candidates; (2) ethnicity plays a subsidiary role; (3) other factors, incumbency, gender, etc., affect who wins; (4) socioeconomic factors affect the way precincts vote; and (5) the differences in elections arise from differences in platforms, personalities, campaign financing, and often factors difficult to measure. Taken together, Dr. Zax concluded Hispanics vote for Democrats, and Democrats don't beat Republicans in HD 60.

To validate his finding, Dr. Zax relied on seven hypothetical contests, the most pertinent of which *predicted* that an Hispanic Democrat non-incumbent male will defeat an Anglo Republican non-incumbent male in a run for the current HD 60 seat. To unseat an incumbent Anglo Republican candidate, however, an Hispanic candidate needs a more heavily Hispanic district, he observed. Nevertheless, an Anglo Democrat running against an incumbent Anglo Republican also loses by an even greater percentage, he predicted.

Thus, although his statistical model produced a similar pattern of racial bloc voting, Dr. Zax infused the calculations with different meanings. Indeed, what seems most striking about his analysis is that he used approximately the same numbers to *predict* outcomes, rather than focusing on the actual elections to examine their outcomes. Based on these predictions, plumbed from the interplay of 49 explanatory variables, Dr. Zax concluded, "political affiliation is the single most important factor that distinguishes between the vote outcomes in precincts that are heavily Hispanics [sic] and heavily Anglo in House District 60. *The role of ethnicity, on the other hand, is relatively minor.*" (italics added). That is, if Anglo Democrats compete against Anglo Republicans and partisanship is the prime determinant, the *single* variant of ethnicity virtually disappears. The inquiry sidesteps *Gingles*' primary analytic focus under § 2. More-

over, in this case, the theory does not appear to be supported by present or historical facts.

First, the naked figures demonstrate registered Democrats in HD 60 have a numerical edge in district-wide elections, if partisanship is the prime motivator of voting behavior. The district court found: (1) about 80% of the Hispanic voting age population is registered Democrat; (2) 20% is registered Republican; (3) 56% of the Anglo population is registered Republican; (4) 44% is registered Democrat; and (5) 16% is registered Independent. 861 F.Supp. at 1527-28.[30] When the percentage of Hispanic and Anglo Democratic vote is combined, *Democrat* voters district-wide voting solely along party lines would appear to command a plurality. Clearly, some other factor, however, affects the presumed Anglo and Hispanic Democratic vote. EDS concluded it was ethnicity as did Dr. Bardwell. Dr. Zax disagreed, although he testified, "in a 100% Anglo voting age population precinct, the Anglo candidate will receive a majority of the votes regardless of whether that candidate is a democrat or a republican."[31]

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[30] Dr. Bardwell testified about 56.8% of the HD 60 voting age population is registered Democrat; 27.5% is registered Republican; and 15.7% is unaffiliated. Dr. Zax's figures were similar: 56.3% of the Anglo population is registered Republican; 19.6% Hispanics are registered Republican.

[31] One of Dr. Bardwell's criticism's of Dr. Zax's report was that 73% of the precincts he analyzed did not involve Hispanic candidates. Both experts submitted critiques of each other's work. Dr. Zax criticized Dr. Bardwell's use of the 1990 census data to study the 1980 through 1990 elections, rather than the 1980 census data. In fact, the Bureau of Census often extrapolates the figures from 1980 and 1990 in such instances. However, if the numbers tend to be roughly the same, it is appropriate to use the 1990 census figures.

[p. 1319]In addition to relying on the State's multivariate analysis, the district court utilized EDS' figure that approximately 20% of Anglo voters in the Valley cross over to vote for the Hispanic candidate of choice and acknowledged Dr. Bardwell's estimate of 13--17% Anglo cross-over. Adding either of these estimates to 42.38% Hispanic voting age population, the court calculated approximately 60% of the voting age population could be projected to vote for the Hispanic candidate of choice. The court then concluded plaintiffs failed to prove the third *Gingles*' precondition, that Anglos vote sufficiently as a bloc usually to defeat the minority's preferred candidate. 861 F.Supp. at 1528.

Gingles, however, doesn't require an absolute monolith in the Anglo or Hispanic bloc vote and recognizes the existence and role of white crossover voting. It does ask, though, whether as a practical matter, whites usually vote as a bloc to defeat the minority preferred candidate. In the face of the array of statistical evidence and the discordant interpretations they produced, the historical fact that an Hispanic candidate has not won election to the state legislature from HD 60 since 1940 must also figure into the district court's evidentiary base. *See Cane v. Worcester County, Md.*, 35 F.3d 921, 926 (4th Cir.1994). Thus, whatever the numbers may mean, *as a practical matter* an Hispanic candidate has never held the HD 60 seat since the district has been drawn to include the Valley. "[T]he lack of success of Hispanic candidates is a strong factor tending to show vote dilution." *Sanchez v. Bond*, 875 F.2d at 1496.

Moreover, the record does not validate Dr. Zax's predictions. He predicted, based on his analysis of 49 explanatory variables, an Hispanic Democrat non-incumbent male will defeat an Anglo Republican non-incumbent male for the HD 60 seat. In 1982, however, the first time the Valley was included in present HD 60, Republican Lewis

Entz, the non-incumbent Anglo candidate, defeated Democrat Alex Marquez, the Hispanic non-incumbent. We believe, therefore, actual outcomes, not predictions of outcomes, provide a more appropriate test.

In concluding partisanship not ethnicity accounted for voting behavior in HD 60, the district court relied on *League of United Latin American Citizens Council No. 4434 v. Clements*, 999 F.2d 831, 853-54 (5th Cir.1993), *cert. denied*, 510 U.S. 1071, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994) (*LULAC*), where minority plaintiffs contended the Texas system of electing trial judges in countywide elections violated § 2. The case is not apposite. First, it operates in a special context in which the courts have weighed the linkage of the judicial and jurisdictional districts a state draws as an important factor in the totality of circumstances. Second, it was premised on the fact that plaintiffs made no effort to establish racial bloc voting in the first instance, relying instead on what they believed was the uncontrovertible evidence of minority failure at the polls. Given *Shaw I* 's caution, "it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned," 509 U.S. at 661, 113 S.Ct. at 2835 (White, J., dissenting) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), and *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)), *LULAC* held "[e]lectoral losses that are attributable to partisan politics do not implicate the protections of § 2." 999 F.2d at 863. However, built-in bias at the polls differs from partisan defeat at the polls. And, *LULAC* actually left for another day the question whether "limiting the racial bloc voting inquiry to a determination whether or not divergent voting patterns are attributable to partisan differences or an underlying divergence in interests best captures the mandate of § 2," recognizing that "partisan affiliation may serve as a proxy for illegitimate racial considerations." *Id.* at 860.

LULAC is, thus, distinguishable and, despite its particular factual context, does not refocus the probativeness of plaintiffs' substantial statistical evidence here.

[p. 1320] We believe the district court relied too much on *LULAC* and not enough on *Gingles* in its ultimate analysis of plaintiffs' proof. We would also trace its mischaracterizing the evidence of racially polarized voting, in part, to its misperceiving *Gingles'* position on the minority's candidate of choice. Citing Justice Brennan's discussion in Part III-C in which only three Justices joined, the district court embraced the per se view that the race of the candidate is irrelevant to the racial bloc voting analysis, a view that five Justices rejected. 861 F.Supp. at 1526. In a separate concurrence, Justice White observed that if race was neutralized by removing the candidate's ethnicity from the racial bloc voting equation, and blacks and whites simply voted along party lines, we could substitute interest group politics "as a rule hedging against discrimination" to explain each outcome. 478 U.S. at 83, 106 S.Ct. at 2783 (White, J., concurring). "I doubt this is what Congress had in mind in amending § 2 as it did," Justice White wrote. *Id.* Justice O'Connor, joined by three other Justices, agreed that defendants cannot rebut a showing of racial bloc voting "by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interest of minority and white votes." 478 U.S. at 100, 106 S.Ct. at 2792 (O'Connor, J., concurring in the judgment).[32] The *Gingles'* majority, then, concluded the candidate's race is

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[32] However, Justice O'Connor rejected the proposition this additional evidence is never relevant to answer the question whether white bloc voting consistently defeats the minority candidate of choice, recognizing its role in the ultimate determination based on the totality of circumstances.

never irrelevant but, generally, is "of less significance than the race of the voter--but only within the context of an election that offers voters the choice of supporting a viable minority candidate." *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 503 (5th Cir.1987), *cert. denied*, 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989).

Second, while lay testimony is relevant to determine who is the candidate of choice, it is not alone dispositive. In *Gingles*, the Court acknowledged the district court "credited some testimony of lay witnesses, but relied principally on statistical evidence." 478 U.S. at 52, 106 S.Ct. at 2767. *Sanchez v. Bond* also approved the use of lay testimony. However, absent the finding the statistical evidence is unreliable, insufficient, or irrelevant, lay testimony should not eclipse the analysis.

Certainly, key to examining racial polarization in the challenged electoral mechanism is determining for whom voters vote. "Ascertaining whether legally significant white bloc voting exists begins with the identification of the minority members' 'preferred candidates' or 'representatives of their choice.' " *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1237 (4th Cir.1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990). Only then can the district court determine whether whites vote sufficiently as a bloc usually to defeat the minority's choice.

Although this court has accepted evidence of Anglo versus Anglo races on the ground such elections may be relevant to discern whether racially polarized voting is present, we cautioned the evidence is useful only "so long as one of the Anglo candidates can be considered a preferred candidate of the minority group." *Sanchez v. Bond*, 875 F.2d at 1495. *Sanchez v. Bond* offers no guidance for the district court to determine who is the minority's candidate of

choice. However, without that evaluation and with a history of Anglo/Anglo contests, we fall prey to the myopic presumption there is a minority preferred candidate in any race in which the minority votes. While some courts shortcut the question looking only to the candidate who has received more than 50% of the minority vote, *NAACP*, 65 F.3d at 1019, we now believe some additional direction would be helpful.

[11] Again we turn to *Gingles* which requires plaintiffs establish by a preponderance of the evidence who is the preferred minority candidate in each election. While "experience does demonstrate that minority candidates will tend to be candidates of choice among the minority," this inference alone is not sufficient to meet plaintiffs' burden. *Jenkins*, 4 F.3d at 1126. Hence, minority plaintiffs must introduce some additional evi-**[p. 1321]**dence, anecdotal or otherwise, to satisfy this burden. "The additional evidence required to meet the threshold, however, is not very substantial, and the burden may be satisfied with a variety of evidence, including lay testimony or statistical analyses of voting patterns." *Id.*

We also embrace *Jenkins*' guidance to judge defendants' evidence that white candidates were, in fact, minority preferred. The Fourth Circuit counsels in measuring this evidence, "the court must engage in a detailed, practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice." *Id.* at 1129. One factor it suggests is the "extent to which the minority community can be said to have sponsored the candidate," to examine minority involvement in originally sponsoring the candidate or helping to finance the candidate's campaign. *Id.* Another factor is the candidate's attention to the issues concerning minorities; the extent the candidate campaigned in the mi-

nority's neighborhoods or addressed predominantly minority crowds. *Id.* Evidence of minority turnout for the election would also be relevant as well as evidence of "disincentives" for minorities to run for office in the first instance. *Id.* Another factor is evidence of the Anglo candidate's ties to the minority community. For example, in this case, one of plaintiffs' witnesses, an Anglo elected Saguache County Commissioner, was the minority preferred candidate because, he testified, he is married to an Hispanic who helped him campaign in Hispanic precincts. This list, of course, is not exclusive, and the district court must be sensitive to the quality of the evidence plaintiffs and defendants offer to assist in this factfinding.

Thus, after such a searching evaluation, the district court may find the minority preferred candidate is, in fact, Anglo. However, the answer cannot be shorthanded by the candidate's partisan label or ethnic or racial status. As Justice O'Connor noted, the question arises within the context of determining whether racial bloc voting defeats the minority's *opportunity* to elect a candidate of its choice. Indeed, the VRA ensures members of a protected class equal opportunity "to elect representatives *of their choice*," not "*necessarily members of their class.*" *NAACP*, 65 F.3d at 1015. However, § 2's "guarantee of equal opportunity is not met when '[c]andidates favored by blacks can win, but only if the candidates are white.' " *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir.1994) (quoting *Smith v. Clinton*, 687 F.Supp. 1310, 1318 (E.D.Ark.1988) (three-judge panel)).

While any statistical analysis permits a body of data to tell a story, how the story is read, each reader bringing a different focus to the details, alters the theme. The glass, after all, is either half empty or half full. *Gingles*, however, instructs us to look for the theme of racial polarization and

the extent to which that polarization robs the minority of meaningful access to the political process. While that may initially set a rather stark stage, "establishing vote dilution does not require the plaintiffs affirmatively to disprove every other possible explanation for racially polarized voting." *Uno*, 72 F.3d at 983. Requiring plaintiffs to rebut a showing that partisan politics and not racial bias operates to defeat their § 2 claim may arise in another setting. However, it is not the story here.

We therefore hold the district court committed reversible error in concluding plaintiffs failed to establish racial bloc voting. First, the district court rejected plaintiffs' evidence of racial bloc voting, even though they used the same statistical method approved in *Gingles* and most of the § 2 case law. Although criticizing various aspects of the methodology, without any searching analysis of the evidence in the first instance, the court's critique is without foundation. Second, it adopted the State's statistical theory on the mistaken view that why voters vote a certain way answers *Gingles*' question about the existence of racial bloc voting. Finally, the court overlooked the substantial evidence of Anglo bloc voting, incorrectly holding that the single factor of partisanship explained electoral outcomes in a § 2 challenge in HD 60.

Because the district court misread the governing law, we reverse its conclusion plaintiffs failed to establish geographical compact-**[p. 1322]**ness, Hispanic cohesiveness, and Anglo bloc voting. We turn now to the ultimate issue of the totality of circumstances.

VIII. Totality of Circumstances

The Senate Report expands two of *Gingles*' preconditions which adumbrate our review of the totality of circumstances: the existence of racially polarized voting and the extent to which minorities are elected to public office. 478 U.S. at 48 n. 15, 106 S.Ct. at 2765 n. 15.[33] Even if plaintiffs succeed in the preliminary *Gingles*' proof and create the inference that minority voters are harmed by the challenged electoral practice, the inference metamorphoses the fact of vote dilution when other explanations for voting outcomes are dispelled. Although § 2 violations may be pronounced only after a flexible, fact-intensive examination of this broadened evidentiary base, the Senate Report places three limits on such proof.

> First, electoral devices ... may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.

Gingles, 478 U.S. at 46, 106 S.Ct. at 2764 (citations omitted).

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[33] We note the Senate Report makes no mention of geographical compactness or the size of the minority group. While the case law bears out the inference this precondition is less important in proving a § 2 violation, it remains an essential element in the *Gingles*' schemata and, as we later discuss, has become the lightening rod for equal protection scrutiny.

[12] Plaintiffs are not required to rebut all the evidence of non-dilution to establish vote dilution. "Rather, the provision requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), 'minimized or canceled out.' " 1982 U.S.C.C.A.N. at 207 n.118. "[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *De Grandy*, --- U.S. at ----, 114 S.Ct. at 2657.

[13] In this case, even though the district court concluded plaintiffs failed to prove each of the *Gingles*' preconditions, it proceeded to the next phase of analysis and concluded based on the totality of circumstances plaintiffs had failed to establish vote dilution. While it is the rare case for minority plaintiffs to satisfy the *Gingles*' preconditions and fail to overcome defendants' evidence that other factors rebut that initial proof, in this case, having concluded plaintiffs made no preliminary showing a remedy is even possible and then finding the totality of circumstances also defeat their claim is remarkable.

Nevertheless, the court's conclusion remains tied to its erroneous application of the contours of the *Gingles*' proof; therefore, it cannot stand. In particular, the court's determination of no racial polarization and a lack of Hispanic political cohesiveness predestined its review of all the evidence and submerged critical facts into less relevant factors. We canvass these findings to explain our conclusion.

First, the district court found no evidence of a history of official discrimination that has "touched the right of the members of the minority group to register, to vote, or

otherwise to participate in the democratic process." 1982 U.S.C.C.A.N. at 206. Although plaintiff, Jennie Sanchez, testified about voter registration problems in Saguache County: voter registration branches placed in Anglo homes where Hispanics would feel uncomfortable entering, limited hours for field workers to register to vote, and the appointment of all Anglo election judges, the district court found plaintiff's official complaint to the State prompted remedial action.[34] **[p. 1323]** Plaintiff testified, in 1986 or 1988, the names of several Hispanic voters whom she had assisted in registering were absent from the voting rolls when they attempted to vote. Charles Grant, a Saguache County Commissioner from 1984-1990, testified he first instituted advertising vacancies on local boards to permit a more open selection process in what was otherwise a system in which Anglo commissioners tapped their friends for appointments. Plaintiff, Jennie Sanchez, also testified, in 1992, the Center Post-Dispatch, a Saguache County newspaper, published a list of absentee voters. The names were mostly Hispanic surnames, which, plaintiff thought masked a subtle racial appeal against Hispanics. Although we agree the list is "a matter of public record," as the district court found, 861 F.Supp. at 1529, the focus here must be *the minority's* perception of the action. To the Hispanic community, publishing a list of Hispanic absentee voters makes a statement about immigrant status, particularly offensive in a predominantly native-born Hispanic population. "In this enlightened day and age, bigots rarely advertise an intention to engage in race-conscious politics." *Uno*, 72 F.3d at 984. While there may be a host of other explanations, minority plaintiffs

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[34] In 1977, the Colorado Attorney General found sufficient evidence of discrimination against Hispanic citizens to warrant referring his report to the Voting Rights Section of the Department of Justice.

are entitled to present circumstantial evidence of racial discrimination to rebut the State's offering other explanations.

Finally, the court acknowledged plaintiffs "perceived" a discriminatory motive behind the ballot initiative making English the official language of Colorado, but stated, "the Amendment was soundly defeated by a solid coalition of Hispanic and Anglo voters." 861 F.Supp. at 1528. In fact, Colorado voters approved Amendment 1. *See* Colo. Const. art. II, § 30a. Hispanic voters in HD 60 overwhelmingly voted against it.

Gingles asks how the challenged electoral structure "interacts with social and historical conditions *to cause* an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47, 106 S.Ct. at 2764 (italics added). Clearly, the Senate Report targets the vestiges of discrimination which may lurk like "a silent, shadowy thief of the minority's rights" continuing to disadvantage minority opportunity. *Uno*, 72 F.3d at 984.

The district court found most of this evidence too remote in time to establish a present impediment to voting in HD 60. We agree the record discloses no current metastases of past discriminatory practices. While it is difficult to draw a bright line demarcating the end of any history of official discrimination in voting, we are satisfied on the whole the district court did not err in concluding such past practices are sufficiently attenuated to mitigate their present effects. Nevertheless, while plaintiffs cannot rely on the lingering effects of alleged discrimination to bolster their case, neither can defendants *explain* the showing of vote dilution by eliminating this factor from the problem.

Another Senate factor asks the extent to which members of the minority "bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." The Senate Report explains, "The courts have recognized that disprorportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation." 82 U.S.C.C.A.N. at 207 n.114.

Although the district court recognized the higher unemployment and poverty rates borne by the Hispanic community in HD 60, it credited certain lay testimony that today, "Hispanics have equal access to education, jobs, and loans," disconnecting any past socioeconomic discrimination from present participation in the political process. 861 F.Supp. at 1529. We believe this finding is, on the whole, contradicted by the overwhelming weight of plaintiffs' evidence, testimonial and documentary. One of plaintiff's experts, Dr. Rodolfo de la Garza, testified that poverty, unemployment, school drop-out, housing, and alcoholism disproportionately affect the Hispanic community in south central Colorado. Based on the 1990 census and demographic information from state agencies, he concluded education, age, income, and employment, accepted predictors of voter participation, create a "reinforcing milieu" which impedes Hispanic participation. This testi-**[p. 1324]**mony was echoed by experts on both sides as well as lay witnesses and legislative representatives discussing the need to increase school funding in south central Colorado. While the record contains testimony about Hispanic students graduating from high school and attending area colleges and community colleges, the broader picture of lower educational achievement by

Hispanic students predominates.[35] Indeed, the district court noted broadly, "[a]ccording to the 1990 Census data, Anglos in the Valley have higher education and income levels than Hispanics, as well as lower unemployment and poverty rates...." 861 F.Supp. at 1529.

The district court found "Hispanics in H.D. 60 turn out to vote at rates only slightly less (1%) than non-Hispanics," while "Hispanic voter registration is virtually equal to Anglo voter registration." 861 F.Supp. at 1529. While it noted, "Plaintiffs themselves have been successful in establishing convenient voter registration hours and in substantially increasing Hispanic voter registration and turnout," *id.*, the testimony reflects this effort redressed discriminatory barriers local officials erected to Hispanic voter registration. In most instances, their vigilance didn't supplement existing voter registration but permitted it to occur in the first instance.

We agree the record includes testimony offered by teachers, Hispanic business owners, elected and party officials to establish that these and other individuals have succeeded.[36] However, the record is replete with

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[35] The record includes a 1978 letter from the Regional Director of Civil Rights finding the Saguache County School District segregated students on the basis of national origin. Current demographic studies in the record reflect the lingering impact of educational disadvantages in the Hispanic community.

[36] Although Hispanics are employed in the Valley's potato industry, few hold managerial positions and Anglos own most of the large potato warehouses. The record contains a photograph of the front gate of a potato warehouse bearing the sign, "No Pase." The gate doesn't display a "No Trespassing Sign;" and while not evidencing "official discrimination," as the district court distinguished, this evidence falls within the intensive canvassing of

demographic, historic, and socioeconomic data which comprehensively fills the canvas. Each facet must be considered under the totality, and the absence of one factor doesn't necessarily cancel out the presence of another. As we stated, the Senate Report doesn't require a final score. While there is some evidence to support the district court's general conclusion, the evidence on the whole points the other way underscoring the nexus upon which the Senate factor focusses.

The district court found no evidence in political campaigns of overt or subtle racial appeals, giving little weight to allegedly discriminatory comments that it found were either hearsay or too remote in time, and finding the publication of the list of absentee voters unnoteworthy. The court's finding is not clearly erroneous.

The second important carryover from the *Gingles* ' "gloss on the totality of the circumstances" is a thoughtful look at the extent to which Hispanics have been elected to office. *Jenkins*, 4 F.3d at 1115. The district court found besides controlling the Democratic party in the Valley, "Hispanics have run for and been elected to numerous political offices in the Valley [and] elected and appointed to local, county, and state-level boards, commissions, and offices." 861 F.Supp. at 1530. We believe the record does not justify the district court's credit of the extent to which minorities have been elected to public office in HD 60.

The Senate Report cautions, "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the [minority] vote, in violation of this section." 1982 U.S.C.C.A.N. at 207 n.15 (citation omitted); *see also Gingles*, 478 U.S. at 76, 106 S.Ct. at

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local fact-finding the Senate Report anticipated.

2779-80. The Report explains, "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution...." *Id.*

Thus, some success at the polls does not negate a showing of polarized voting or disprove the existence of vote dilution. Moreover, "exogenous elections--those not involving the particular office at issue--are less **[p. 1325]** probative than elections involving the specific office that is the subject of the litigation." *Clark v. Calhoun County*, Miss., 88 F.3d 1393, 1397 (5th Cir.1996). Plaintiffs here complain they cannot elect their candidate of choice to the Colorado General Assembly because the configuration of HD 60 dilutes their vote. They offer the single fact an Hispanic has not been elected to this particular office since 1940. That fact is probative under the totality, notwithstanding the mayoral offices, rural electrical boards, and other seats Hispanics have achieved.

An additional factor the district court examined is whether elected officials are responsive to the particularized needs of the minority group. It found generally that HD 60 Representative Lewis Entz has addressed issues important to his Hispanic constituency, cooperates with Hispanic representatives in the legislature, and works for "economic development, education, and water." 861 F.Supp. at 1530. Although Mr. Entz was taken to task for referring to Hispanics as "wetbacks," he testified he didn't believe the term was derogatory but apologized for using it publicly.

While there is evidence to the contrary, we do not judge the district court's finding HD 60's elected official responsive to the minority community clearly erroneous. This factor, however, does not defeat plaintiffs' claim. "Unresponsiveness is not an essential part of plaintiff's case," the

Senate Report states, and the cases consider it of only "limited relevance." 1982 U.S.C.C.A.N. at 207 n.116; *Harvell v. Blytheville School Dist. No. 5*, 33 F.3d 910, 917 (8th Cir.1994). In *Clark*, 88 F.3d at 1400, the Fifth Circuit concluded the district court attached too much weight to the finding the county was responsive to the minority community's needs. The Fifth Circuit counseled, "[r]esponsiveness, like many things, is a question of both kind and degree. While two cities may both be said to be responsive to minority needs, the two may vary greatly in approach and commitment. The totality-of-circumstances inquiry is not blind to those differences." *Id.* at 1401; *see also Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109, 1123 (5th Cir.1991) (§ 2 violated although plaintiffs did not prove lack of responsiveness). Thus, while the district court's finding is not clearly erroneous, its relevance and weight in the entire balance are limited.

Finally, the court found the policy underlying the state's drawing HD 60 was not tenuous, citing that evidence "show[ing] that the Colorado Reapportionment Commission followed the dictates of § 2 in drawing H.D. 60 from the beginning to the end of the reapportionment process." 861 F.Supp. at 1530. It noted the newly drawn district actually increased the Hispanic voting age population by 5%, was approved by the Colorado Supreme Court, and reflected the overwhelming community sentiment to keep the Valley whole.

The Senate Report explains this factor, indicating "[i]f the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the

challenged practice denies minorities fair access to the process." 1982 U.S.C.C.A.N. at 207 n.117.

The record casts doubt on the court's finding the Commission from beginning to end observed the tenets of § 2. Indeed, the final decision to draw HD 60 in its present form eschewed EDS's recommendation a majority Hispanic district was required based on the research the Commission specifically requested.[37] Further, members of the Commission voiced concern that accommodations were made to create black majority districts elsewhere in the state[38] when the case pre-**[p. 1325]**sented by the Hispanic community in

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[37] At the final meeting, a Commission member stated, "I guess the question that I have, everybody is talking in figures of 45 or 46 and in light of what we just did in Denver to get 49 percent black in a district [which] the EDS report says has a lot less problems as far as whites being willing to vote for minority candidates. San Luis Valley it said had a bigger problem. Why are we talking about 45 or 46 percent, when we just said 49 was what we had to do in Denver when there was a lot of white crossover voting that were voting comparably to the valley."

[38] One Commission member argued, "I guess my reply to that, is that if you do believe the EDS data and, I guess the leadership of [the] legislature selected those guys to do the work, the only empirical data that we have, that the court's use, we should be doing the Denver districts at 45, and this one at 49 or 50, at least. They said 50% voting age in the valley. We're doing just the opposite. You know, we may be able to juggle a few of those numbers. I think that we have a really, really weak case if we do this in court."

south central Colorado was equally as compelling.[39] These facts bear upon whether the resulting district is fair.

The question then becomes whether the decision to draw HD 60 in the complained of configuration "markedly departs from practices elsewhere in the jurisdiction, that bears on the fairness of its impact." As noted, the decision was a quintessentially political one, ramified by concerns about pitting incumbents against each other, splitting cities differently, and dividing the Valley to create the necessary population base. In the final vote, these "traditional districting principles," splitting counties and cities and the protection of incumbents, were elevated over compliance with § 2 despite the Commission's knowledge of a perceived vote dilution problem in HD 60. Although the resulting district increased the Hispanic voting age population by 5%, the record establishes the Commission was fully aware that effort was insufficient to create the Hispanic majority district EDS recommended based on the extent of racially polarized voting. We do not suggest traditional districting principles were used as a pretext for discrimination. Nevertheless, "it would be irresponsible for a State to disregard the § 2 results test." *Bush*,

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[39] At the meeting, a member from Denver observed, " I just have some difficulty thinking that all of a sudden there is a change of heart in that 53% of the people that make up the other part of the population. Now in saying that's okay, we've not been fair to you ... we've treated you badly, we're going to do something about it. Passing resolution by county commission and what have you, don't necessarily indicate to me that things would change. Would that have happened if we had not published this preliminary plan." The speaker is referring to the Ventura Plan, proposed by a Commission member, which would have split the Valley, included the city of Trinidad, and increased the Hispanic voting age population to approximately 46.84%. Publication of the proposal, as noted, prompted the SLV County Commissioner Association to act.

--- U.S. at ----, 116 S.Ct. at 1969. Again, plaintiffs have offered evidence of the process which the Senate Report envisioned placing within the quantum tending to show a violation under the totality of circumstances. Plaintiffs did not have to show the resulting district was a pretext for discrimination. The "fairness of the impact" was demonstrated by the 1992 election in which the incumbent was returned to the General Assembly for his sixth consecutive term.

Thus, "through other factors," racially polarized voting and electoral success for the HD 60 seat, we believe plaintiffs have presented evidence to rebut the State's contention the resulting district does not deny them "fair access to the process." Again, the district court misjudged the weight to be attributed this factor and allowed secondary evidence to subsume the primary evidence of racial polarization.

IX. *Shaw II* and *Bush*

In its conclusion, the district court characterized plaintiffs' § 2 claim, "[a]s a practical political matter," an effort "to segregate political districts by race [which] can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions." 861 F.Supp. at 1531 (citing *Holder v. Hall*, --- U.S. at ----, 114 S.Ct. at 2599 (Thomas, J., concurring) (size of voting district does not violate § 2)). "The Plaintiffs would have the court assume 'that members of the racial group must think alike and that their interests are so distinct that the group must be provided a separate body of representatives in the legislature to voice its unique point of view.' " *Id.* (quoting *Holder*, --- U.S. at ----, 114 S.Ct. at 2599). Surely, all voting rights cases are premised on minority status and, necessarily, seek some "special" treatment of minority voters shown to have been denied that

guarantee. Eliminating poll taxes, literacy tests, and multimember districting schemes which submerged minority voters in majority populations perhaps were the easier remedies. In this new round, the challenge has turned to single member districts drawn to remedy **[p. 1327]** minority vote dilution which ostensibly balkanize minority and majority populations in alleged violation of the Fourteenth Amendment.

At this point, we must digress from the immediate resolution of this case to the Supreme Court's most recent guidance to address two of the district court's concerns and preempt the argument, based on these recent cases, that any remedy here may unwittingly violate the Equal Protection Clause. Despite this apparent detour, we shall return to the substance of plaintiffs' claim: a fair opportunity to elect representatives of their choice.

On the one hand, adherence to *Gingles* to remedy violations of § 2 necessarily implicates race. On the other hand, how closely that remedy comes to triggering "the Court's equal protection angst" seems to arise when a constitutional line is drawn "at cartographic departures from 'traditional districting principles.' " S. Issacharoff, The Constitutional Contours of Race and Politics, 1995 S.Ct. Rev. 45, 47 (1996). The latest round of Supreme Court cases from *Miller v. Johnson*, --- U.S. ----, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), to *Shaw I*, *Shaw II*, and *Bush* scrutinizes these outer limits of race-based districts where § 5 of the VRA mandated a cure which the Court then found violated the Equal Protection Clause. Upon this new terrain, *Gingles* retains viability to determine the § 2 violation, but, once found, *Shaw II* and *Bush* teach us that race cannot *override* all other traditional districting principles any more than reasonably necessary to remedy the violation.

In each of the recent cases, the proposed district's bizarre shape triggered strict scrutiny, unmistakably suggesting that race was the legislature's predominant consideration in redistricting. *Miller*, --- U.S. at ----, 115 S.Ct. at 2488. In *Miller*, the newly created Eleventh District was geographically "a monstrosity, stretching from Atlanta to Savannah." --- U.S. at ----, 115 S.Ct. at 2484. However, "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at ----, 115 S.Ct. at 2486. Consequently, to satisfy the strict scrutiny the Eleventh District triggered, the Court held, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id.* at ----, 115 S.Ct. at 2490. *Miller* left open the question whether compliance with the VRA, "standing alone, can provide a compelling interest independent of any interest in remedying past discrimination." *Id.* at ---- - ----, 115 S.Ct. at 2490-91. However, "under a correct reading of the statute," *id.* at ----, 115 S.Ct. at 2491, the proposed district was not required.

Bush answered the question left open in *Miller*. In her separate concurrence, in which four Justices joined, Justice O'Connor announced, "compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest." --- U.S. at ----, 116 S.Ct. at 1968. As we noted, in Colorado, compliance with the VRA falls second only to the one person, one vote requirement and precedes all traditional districting concerns. Consequently, if a § 2 violation is found, Colorado has a compelling state interest in seeking a remedy tailored by its traditional districting principles.

It is now a given that shape triggers strict scrutiny, and in this case the State argued, and the district court agreed, plaintiffs' proposed alternative district was not geographically compact. In a vote dilution case, once plaintiffs have established the second and third *Gingles*' preconditions, the *Gingles*' compactness requirement is the entry into the narrow tailoring question. If the state has a compelling interest in avoiding § 2 liability and if the minority population is concentrated enough to form a majority minority district, the state must "tailor its districts narrowly to serve that interest." *Id.* at ----, 116 S.Ct. at 1971 (Kennedy, J., concurring). Although Justice O'Connor concluded § 2 does not require a non-compact majority-minority district, Justice Kennedy observed, "neither does [§ 2] forbid it, provided that the rationale for creating it is proper in the first instance. Districts not drawn for impermissible reasons or according to imper-**[p. 1328]**missible criteria may take any shape, even a bizarre one." *Id.* at ----, 116 S.Ct. at 1972.

Justice O'Connor clarified the contours of proof necessary for a state to have a compelling interest in remedying discrimination under § 2. Two conditions, Justice O'Connor wrote, must be satisfied: "First, the discrimination that the State seeks to remedy must be specific, identified discrimination; second, the State must have had a strong basis in evidence to conclude that remedial action was necessary, before it embarks on an affirmative action program." *Id.* at ---- - ----, 116 S.Ct. at 1962-63 (citation omitted) (internal quotations omitted). For purposes of proof, Justice O'Connor accepted as valid a claim of vote dilution caused by racial bloc voting for the state's § 2 compliance defense. *Id.*

The factual predicates for these recent cases cannot be ignored. In each challenged district, voters were grouped *solely* on the basis of race, even when the district didn't

address the precise violation found, *Shaw II*, when geographical and political boundaries were ignored, *Shaw II* (district followed interstate highway); and *Bush* (district fragmented precincts and neighborhoods). In each instance, the individuals were selected solely on the basis of their race, raising the specter of a new genre of political apartheid.[40] In our case, plaintiffs' proposed alternative district attempted to bring together Hispanic voters who also live in geographically connected areas that share the same agricultural and rural communities of interest, along with various socioeconomic concerns. Thus, although race figures in the configuration of the proposed alternative Hispanic majority district, it is not "in substantial disregard of customary and traditional districting practices." *Miller*, --- U.S. at ----, 115 S.Ct. at 2497 (O'Connor, J., concurring). Moreover, Justice O'Connor acknowledged "the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available." *Bush*, --- U.S. at ----, 116 S.Ct. at 1964.

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[40] In *Bush*, the Court quoted the district court's finding:

> For the sake of maintaining or winning seats in the House of Representatives, Congressmen or would-be Congressmen shed hostile groups and potential opponents by fencing them out of their districts. The Legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts. The final result seems not one in which the people select their representatives, but in which the representatives have selected the people.

--- U.S. at ----, 116 S.Ct. at 1954 (quoting *Vera v. Richards*, 861 F.Supp. 1304, 1334 (S.D.Tex.1994)) (citations and footnotes omitted).

[14, 15] *Miller* and its progeny, thus, offer a solution for remedying a found violation. Four principles emerge from these cases which sharpen the focus on the existing alleged violation. First, redistricting in which racial concerns predominate, done even for remedial purposes, is subject to strict scrutiny. Second, compliance with § 2 of the VRA constitutes a compelling governmental interest. Third, the discrimination the state seeks to remedy must be specific. Fourth, the state must have a strong basis in evidence to conclude the *Gingles* ' preconditions exist to justify the redistricting as reasonably necessary to comply with § 2. Fifth, states may intentionally create majority-minority districts and otherwise take race into consideration without coming under strict scrutiny so long as traditional districting criteria are not subordinated. *Id.* at ----, 116 S.Ct. at 1969.

In response to our order to the parties to address these latest cases, plaintiffs rely upon Justice Kennedy's statement the compactness requirement refers "to the compactness of the minority population, not to the compactness of the contested district". *Id.* at ----, 116 S.Ct. at 1971. Plaintiffs urge the distinction was lost on the district court which superimposed the shape of the proposed alternative district exclusively and ignored the size and compactness of the Hispanic population in south central Colorado. Plaintiffs insist the *Bush* plurality would permit even a bizarrely shaped district that is narrowly tailored to fit the found VRA violation. The State reads these recent cases to underline the correctness of the district court's order.

As we earlier discussed, the district court's definition of geographically compact was too **[p. 1329]** limited and did not incorporate the notion of compactness of the minority population itself, not simply the area enclosing them. Second, in deciding whether any remedy was available, the district court diffused the compactness inquiry with concerns

over impacting adjacent districts. While it cannot be gainsaid that increasing the minority population in one area will necessarily extract minority population from another, "without this phenomenon, no majority-[minority] districts would ever be created." *Clark*, 21 F.3d at 95; *Houston v. Lafayette County, Miss.*, 56 F.3d at 610-11. In fact, no county in south central Colorado including the Valley, Pueblo, and Trinidad, emerged after the 1992 redistricting with an Hispanic voting age majority population.[41] In any event, the concern is better addressed to the remedial phase of this litigation in which the State must have the first opportunity to draw HD 60.

Again, because plaintiffs sought only to establish the *possibility* of an alternative district, we do not linger on its specifics, the counties and cities it splits, or the mathematical scores it generates. "Districting plans are integrated bundles of compromises, deals, and principles ... representing an array of values, some relatively neutral, some intensely partisan." *Expressive Harms*, 585. At this stage, it remains academic to compare the proposed alternative to other oddly shaped or unusually large districts in Colorado. Suffice we recognize the proposed alternative evidences none of the extreme bizarreness of any of the districts that offended the Court and leave the drawing of boundaries to the area of politics in which it belongs.

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[41] In adjacent HD 46, which includes part of Pueblo with its large Hispanic population, Representative Gilbert Romero, has been elected five times to the General Assembly, running in each general election unopposed. The other adjacent district, HD 47, is represented by Mike Salaz, a Republican who has won reelection, and is not considered the Hispanic candidate of choice.

X. Conclusion

The "expressive harms" plaintiffs have alleged cannot be recast as political balkanization, as the district court decried, especially in light of the Supreme Court's directive that compliance with § 2 is a compelling state interest. Plaintiffs, instead, availed themselves of the protections of § 2, seeking to establish they do not presently have the same *fair*Y opportunity to elect representatives of their choice to the General Assembly. Their proof echoed what the State's redistricting Commission considered before it drew the currently complained of district. They further established under the totality of circumstances racial polarization drives the voting community in HD 60 despite limited local success in being elected or appointed to political office. Consequently, plaintiffs have satisfied the two conditions necessary for the State to have a compelling interest to remedy their § 2 claim. Although we conclude the district court incorrectly applied the governing law, nonetheless, we recognize Congress has handed to the courts the task of interpreting and applying a law which appears deceptively simple. Yet, that law is exasperatingly complex, requiring application of principles and concepts drawn from disciplines foreign to most judges. Therefore, criticism is not to be leveled at anyone who conscientiously attempts to come to grips with the monumental and salutary task given to us. We must, however, **REVERSE** the judgment and **REMAND** the case to the district court with directions to order the State to implement a remedial plan of redistricting consistent with this opinion and the dictates of § 2.

APPENDIX B

Jennie SANCHEZ, Adeline Sanchez,
and Debra Casanova, Plaintiffs,

v.

The STATE OF COLORADO and Natalie
Meyer, in her official capacity as
Secretary of State for the State of
Colorado, Defendants.

Civ. A. No. 93-S-0963.

United States District Court,
D. Colorado.

Aug. 31, 1994.

* * *

[p. 1519] MEMORANDUM OPINION AND ORDER

SPARR, District Judge.

THIS MATTER came before the court for trial on March 21, 1994 through March 25, 1994. The court heard final argument on June 8, 1994. Having reviewed all of the evidence, the arguments, and the applicable law, and being fully advised in the premises, the court finds and concludes as follows.

The Plaintiffs bring a single claim for relief for violation of § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. Plaintiffs allege that District 60 of the Colorado House of Representatives (H.D. 60), as it is

currently configured, violates § 2 by unlawfully diluting the voting strength of Hispanic citizens in South Central Colorado. Plaintiffs ask the court to: (1) declare that H.D. 60 violates § 2; (2) grant a permanent injunction preventing any further elections for representative to the Colorado General Assembly from H.D. 60 as it is presently configured; (3) order the adoption of a redistricted H.D. 60 that contains a majority Hispanic voting age population; and (4) award Plaintiffs their fees and costs.

A. *Background*

In 1992, pursuant to Colorado's reapportionment process set forth in Article V, § 48 of the Colorado Constitution, the Colorado Reapportionment Commission devised H.D. 60 as presently drawn. H.D. 60 is comprised of Alamosa, Conejos, Costilla, Huerfano, Mineral, Rio Grande, and Saguache counties, plus the portion of Las Animas that is west of Trinidad. All of these counties, except Huerfano and Las Animas, are considered to be in the San Luis Valley (the Valley). Hispanics are estimated to comprise 45.31% of the total population and 42.38% of the voting age population of H.D. 60. The 1992 redistricting increased the total Hispanic voting age population in H.D. 60 by approximately five percent (5%).

In 1991 and 1992, Colorado's Reapportionment Commission conducted meetings and hearings, heard extensive presentations, and compiled substantial reports regarding the redistricting of South Central Colorado and H.D. 60. (Plaintiffs' Exhibits 9-20, 30, 33, 34, 47, 72, 83, 86, 87, 92, 93; Defendants' Exhibits F1, F2, F3, G, H, I, J, K, L, L1-L6). The testimony at the hearings favored preserving the Valley intact and disapproved splitting the Valley in order to increase the percentage of Hispanic voters. (*See* Plaintiffs' Exhibits 14, 15, 16 and Defendants' Exhibits H, I, J, L4). Testimony at the hearings revealed

that Hispanics in the Valley have different political interests than Hispanic voters outside the Valley. There was no suggestion to the Commission that an Hispanic community of interest existed between the Valley, Pueblo, and Trinidad. After extensive consideration, the Commission identified certain specific goals for redistricting the southern central part of the State, among others: (1) preserving the Valley in a single house district; (2) separating the Valley from western slope districts; (3) preserving Pueblo West in a single house district; and (4) preserving Huerfano and Las Animas counties in a house district extending east, not west. (*See* Plaintiffs' Exhibit 17, p. 1.). The plan ultimately adopted by the Reapportionment Commission was upheld by the Colorado Supreme Court, over a challenge to H.D. 60 by two of these same Plaintiffs. *In re Colorado General Assembly*, 828 P.2d 185, 193 (Colo.1992). Plaintiffs now allege that the drawing of the present H.D. 60 violates § 2 of the Voting Rights Act by diluting Hispanic votes in South Central Colorado.

B. *Legal Framework*

Because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place, federal courts are barred from intervening in state apportionment in the absence of a violation of federal law. *Voinovich v. Quilter*, --- U.S. ----, **[p. 1520]** ---- - ----, 113 S.Ct. 1149, 1156-57, 122 L.Ed.2d 500 (1993). "[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 507 U.S. ----, ----, 113 S.Ct. 1075, 1081, 122 L.Ed.2d 388 (1993), citing *Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975). Because the States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law, the federal

courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements. *Voinovich*, --- U.S. at ----, 113 S.Ct. at 1157 (citations omitted).

In 1982, § 2 was amended to eliminate the need to prove discriminatory intent in order to prove a violation of § 2. *Thornburg v. Gingles*, 478 U.S. 30, 43-44, 106 S.Ct. 2752, 2762-2763, 92 L.Ed.2d 25 (1986). Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973(f)(2)], as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Hispanics are members of a class of citizens protected by § 1973(a). 42 U.S.C. § 1973f(2).

Section 2 claims are analyzed under a two-part framework. *Magnolia Bar Ass'n., Inc. v. Lee*, 994 F.2d 1143, 1146 (5th Cir.), *cert. denied*, --- U.S. ----, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993). To prevail on a § 2 claim, the Plaintiffs must first satisfy certain threshold requirements set forth by the Supreme Court in *Gingles*, 478 U.S. at 30, 106 S.Ct. at 2752. *Lee*, 994 F.2d at 1146. Minority voters must then offer evidence of the totality of circumstances to demonstrate whether the challenged election practice "has resulted in the denial or abridgment of the right to vote based on color or race." *Lee*, 994 F.2d at 1146, citing *Chisom v. Roemer*, 501 U.S. 380, 393, 111 S.Ct. 2354, 2363, 115 L.Ed.2d 348 (1991).

[1, 2] A claim of vote dilution in a single member district requires proof meeting the same three threshold conditions for a dilution challenge to a multimember district. *Johnson v. DeGrandy*, --- U.S. ----, ---- - ----, 114 S.Ct. 2647, 2654-55, 129 L.Ed.2d 775 (1994), citing *Growe*, --- U.S. at ----, 113 S.Ct. at 1084; *Lee*, 994 F.2d at 1146. To satisfy the *Gingles* threshold inquiry, the minority group must prove by a preponderance of the evidence that: (1) it is sufficiently large and geographically compact to constitute a majority in a single member district; (2) it is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority group's preferred candidate. *DeGrandy*, --- U.S. at ---- - ----, 114 S.Ct. at 2654-55 (citations omitted); *Lee*, 994 F.2d at 1146, citing *Gingles*, 478 U.S. at 48-51, 106 S.Ct. at 2765-2767. The three threshold factors are "necessary preconditions" for establishing vote dilution. *DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2657, quoting *Gingles*, 478 U.S. at 50, 106 S.Ct. at

2766. If these *Gingles* threshold factors are not present, then the challenged electoral practice cannot be considered as the cause of the minority's inability to elect its preferred candidate. *Sanchez v. Bond*, 875 **[p. 1521]** F.2d 1488, 1492 (10th Cir.1989), *cert. denied*, 498 U.S. 937, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990), citing *Gingles*, 478 U.S. at 50, 106 S.Ct. at 2766. Failure to establish any one of the *Gingles* factors precludes a § 2 violation. *Growe*, --- U.S. at ----, 113 S.Ct. at 1084; *Lee*, 994 F.2d at 1146, citing *Gingles*, 478 U.S. at 50, 106 S.Ct. at 2766.

[3] Because Congress intended the ultimate conclusions about equality or inequality of political opportunity to rest on "comprehensive, not limited, canvassing of relevant facts," the three *Gingles* preconditions may not be isolated as sufficient, standing alone, to prove vote dilution. *DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2657. Once the minority group satisfies the *Gingles* threshold inquiry, it must then offer evidence of the totality of circumstances demonstrating that the minority group has "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." *Lee*, 994 F.2d at 1146, citing 42 U.S.C. § 1973(b).

[4] The Senate Report accompanying the 1982 amendments to § 2 listed several factors that may be relevant to the totality of circumstances inquiry in a § 2 claim:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction;

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Sanchez, 875 F.2d at 1491-92, citing S.Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. In applying these factors, the court should keep certain additional considerations in mind: (1) that the list is exemplary, not exclusive--the court may consider any relevant factors in reaching its conclusion; (2) that there is no requirement that any particular number of factors be proved or that a majority of them point one way or the other; and (3) that whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality and upon a functional view of the political process. *Sanchez*, 875 F.2d at 1492, citing *Gingles*, 478 U.S. at 46, 106 S.Ct. at 2764. Loss of political power through vote dilution is distinct from the mere ability to win a particular election. *Whitcomb v. Chavis*, 403 U.S. 124, 153, 91 S.Ct. 1858, 1873, 29 L.Ed.2d 363 (1971). Ultimately, a district court can find a § 2 violation only if, "in the particular situation, the [challenged] practice operate[s] to deny the minority plaintiff[s] an equal opportunity to participate [in the political process] and to elect candidates of their choice." *Lee*, 994 F.2d at 1147, citing S.Rep. No. 417, 97th Cong., 2d Sess. at 30; 1982 U.S.C.C.A.N. at 207.

[p. 1522] The court must be careful not to overemphasize the relative importance of the three *Gingles* factors and of historical discrimination, when measured against evidence tending to show that in spite of these facts, minority voters have an equal measure of political and electoral opportunity. *DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2658. A conclusion of lack of equal electoral opportunity "must still be addressed explicitly, without isolating any other arguably relevant facts from the act of judgment." *DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2657. The probative significance of the *Gingles* factors must be critically assessed after considering further circumstances with arguable bearing on

the issue of equal political opportunity. *DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2658. Proof of the three *Gingles* factors is not enough "if other considerations show that the minority has an undiminished right to participate in the political process." *DeGrandy*, --- U.S. at ---- n. 10, 114 S.Ct. at 2657 n. 10, quoting *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir.1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 2334, 124 L.Ed.2d 246 (1993) ("other considerations" included the fact that while the four at-large City-County Council seats tended to go to Republicans, one of the Republicans elected was black). "As facts beyond the ambit of the three *Gingles* factors loom correspondingly larger, factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution." *DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2658.

C. *Analysis*

1. The First *Gingles* Factor: Geographical Compactness of Minority Group

[5] First, the burden of proving the *Gingles* preconditions rests "squarely on the plaintiff's shoulders." *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1045 (D.Md.1994), quoting *Voinovich*, --- U.S. at ----, 113 S.Ct. at 1156. Second, the compactness requirement is not a trivial concept. Where a minority group is not large enough, geographically concentrated enough, or politically cohesive enough to constitute a voting majority in a single member district, a claim for vote dilution fails. *Gingles*, 478 U.S. at 90, 106 S.Ct. at 2787 (O'Connor, J., concurring). A showing of geographical compactness is a threshold matter because, unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have

been injured by the structure or practice. *Garza v. County of Los Angeles*, 756 F.Supp. 1298, 1344 (C.D.Cal.1990), citing *Gingles*, 478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17 (emphasis in original).

The Plaintiffs say they have shown that "it is possible to draw a majority-Hispanic House district which unites significant Hispanic population concentrations in the San Luis Valley and Pueblo and Las Animas counties." (Plaintiffs' Post-Trial Memorandum p. 51). Plaintiffs' statistical expert, Dr. Bardwell, developed three alternative State House districts with Hispanic voting age populations of 50.03%, 51.6%, and 54.8%. The Plaintiffs concentrated on the proposed 50.03% alternative H.D. 60. The first *Gingles* precondition requires the court to determine whether the Hispanic population within the Plaintiffs' proposed alternative H.D. 60 is sufficiently large and geographically compact to constitute a majority in that district.

[6] While the Plaintiffs are not required to provide a final redistricting plan for remedial purposes, the burden is on the Plaintiffs to prove that Hispanics are sufficiently numerous and geographically compact to constitute a majority in an alternative district. It is appropriate to consider the size and geographic compactness of the minority group within a reasonable alternative district as a benchmark against which to measure the existing district that is being challenged as dilutive. *See Holder v. Hall*, --- U.S. ----, ---- - ----, 114 S.Ct. 2581, 2585-86, 129 L.Ed.2d 687 (1994).

[7] Several principles guide the court in its comparison of the proposed alternative H.D. 60 and the challenged present H.D. 60. First, courts should be reluctant to order the creation of districts of "bizarre" or "dramatically irregular" shape. *Marylanders*, 849 F.Supp. at 1053, quoting *Shaw v. Reno*, --- **[p. 1523]** U.S. ----, ----, ----, ----, 113 S.Ct. 2816,

2820, 2825, 2831, 125 L.Ed.2d 511 (1993). Courts should pay attention to both geometric and substantive criteria when testing for compactness under *Gingles*. *Marylanders*, 849 F.Supp. at 1053. The Plaintiffs need not establish that the minority population is compact in an absolute or aesthetic sense; they need only establish that it is "sufficiently ... compact" to show that a majority Hispanic district is feasible. *Gingles*, 478 U.S. at 50, 106 S.Ct. at 2766.

Second, although a state can, and at times must, place great weight on race when redistricting, it may not do so to the exclusion of all traditional, nonracial districting principles, leaving a district that rationally can be understood only as "an effort to classify and separate voters by race." *Marylanders*, 849 F.Supp. at 1053, quoting *Shaw*, --- U.S. at ----, 113 S.Ct. at 2828. Although no Fourteenth or Fifteenth Amendment claims are now before the court, it is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause. *DeGrandy*, --- U.S. at ---- - ----, 114 S.Ct. at 2666-67 (Kennedy, J., concurring). " '[A] reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race' must be subject to strict scrutiny under the Equal Protection Clause." *Id.* --- U.S. at ----, 114 S.Ct. at 2667, quoting *Shaw*, --- U.S. at ----, 113 S.Ct. at 2832. "Racial classifications 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,' and are presumed invalid." *Id.* --- U.S. at ----, 114 S.Ct. at 2666, quoting *Shaw*, --- U.S. at ----, ----, 113 S.Ct. at 2816, 2818. "This is true regardless of 'the race of those burdened or benefited by a particular classification.' " *Id.*, --- U.S. at ----, 114 S.Ct. at 2666, quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494, 109 S.Ct. 706, 722, 102 L.Ed.2d 854 (1989). "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial

factions; it threatens to carry us further from the goal of a political system in which race no longer matters--a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.* --- U.S. at ----, 114 S.Ct. at 2666, quoting *Shaw*, --- U.S. at ----, 113 S.Ct. at 2832. "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, --- U.S. ----, ----, 113 S.Ct. 2816, 2827, 125 L.Ed.2d 511 (1993).

The court is also guided by the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Colorado Constitution, art. V, §§ 46-47. Colorado's 1992 reapportionment plan (including H.D. 60) was required to be consistent with six parameters in order of importance: (1) the Fourteenth Amendment Equal Protection Clause and the Fifteenth Amendment; (2) § 2 of the Voting Rights Act; (3) the Colo. Const. art. V, § 46, requiring equality of population in each house district; (4) the Colo. Const. art. V, § 47(2), requiring that districts not cross county lines except to meet § 46 requirements and requiring that the number of cities and towns contained in more than one district be minimized; (5) the Colo. Const. art. V, § 47(1), requiring each district to be as compact as possible and to consist of contiguous whole general election precincts; and (6) the Colo. Const. art. V, § 47(3), requiring preservation of

communities of interest within a district.[1] *In re Colorado General Assembly*, 828 P.2d at 190.

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[1] Colo. Const. art. V, § 46 provides:

> **Senatorial and representative districts.** The state shall be divided into as many senatorial and representative districts as there are members of the senate and house of representatives respectively, each district in each house having a population as nearly equal as may be, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

Colo. Const. art. V, § 47 provides:

> (1) Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall consist of contiguous whole general election precincts. Districts of the same house shall not overlap.
>
> (2) Except when necessary to meet the equal population requirements of section 46, no part of one county shall be added to all or part of another county in forming districts. Within counties whose territory is contained in more than one district of the same house, the number of cities and towns whose territory is contained in more than one district of the same house shall be as small as possible. When county, city, or town boundaries are changed, adjustments, if any, in legislative districts shall be as prescribed by law.
>
> (3) Consistent with the provisions of this section and section 46 of this article, communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible.

[p. 1524] *a. Is the Hispanic population sufficiently large and geographically compact to constitute a majority in the Plaintiffs' proposed H.D. 60?*

The Valley is geographically unique. It is surrounded by the Sangre de Cristo mountains to the east, the La Garita mountains and Cochetopa Hills to the north, and the San Juan mountains to the west. Access to the Valley is primarily by way of La Veta Pass on U.S. Highway 160 to the east, Wolf Creek Pass on U.S. Highway 160 to the west, Poncha Pass on U.S. Highway 285 to the north, and San Antonio Mountain on U.S. Highway 285 to the south. At 8,194 square miles, the Valley is the largest intermountain valley in the world. Alamosa is the largest city with a 1992 population of 7,892 and Monta Vista the second largest with 4,621. Alamosa is the recognized growth center and has the most retail trade and services activity, while Monte Vista is the agribusiness center. Alamosa is the banking, education, and health care hub of the Valley. (Testimony of Juan Gomez, Defendants' Exhibits V, W, Y, and 2K).

Approximately 58% of the Valley's floor is used as rangeland, 25% as cropland, and 11% as pastureland. Approximately 57.4% of the Valley is managed by the federal government, 3.9% is State land, and 38.5% is privately owned. Federal presence is greatest in Mineral and Saguache counties and private ownership is greatest in Costilla and Alamosa counties. The Valley's agricultural economy is dependent upon irrigation, leaving the Valley with unique water needs. Surface water supply comes from snowmelt into the Rio Grande and Conejos Rivers. Another major source of water is the extensive underground aquifer system underlying the Valley floor. (Defendants' Exhibits 2I and 2K).

Agriculture and agribusiness are the Valley's major export industries and comprise approximately 27.3% of the

Valley's economy. The Valley is the nation's fifth largest potato growing region. In 1991, Valley potato production represented 92.1% of Colorado's potato crop. Most labor in the Valley is used for agricultural production and packing operations. (Defendants' Exhibit 2K).

The Valley was settled on Mexican land grants by Hispanos, Spanish-speaking people from New Mexico who considered themselves to be of Spanish, not Mexican, descent. Pueblo was not part of the "Hispano Homeland" and was settled after the Valley. (Plaintiffs' Exhibits 64, 103). Hispanics in the Valley share a common Spanish colonial cultural and religious heritage which continues to value the extended family. While the majority of Hispanics in the Valley are Catholic, many Hispanics are affiliated with various protestant churches. Catholic parishes and parishioners maintain their independence from the Pueblo Diocese of which they are members. (Defendants' Exhibit V).

Pueblo is located on I-25, approximately 120 miles from Alamosa. Most of the communities in the Valley do not receive radio and television communications from Pueblo. Pueblo is a long distance telephone call from the Valley. Pueblo and the Valley each have their own colleges. In 1990, Pueblo was the fifth largest city in Colorado, with a population of 98,640. The age composition of Pueblo has undergone significant change, resulting in an increased proportion of the elderly population. Approximately 40% of Pueblo's population is Hispanic, but the distribution is not uniform or homogeneous. Pueblo has experienced an increasing crime rate and Pueblo constituents are concerned with issues of crime and gangs. (Defendants' Exhibits V and 2M).

[p. 1525] Hispanos who later settled in Pueblo moved from a rural, agricultural lifestyle to an urban, wage and

labor lifestyle. The Valley remains a primarily agriculturally-based economy, while Pueblo retains an industrially-based economy. In 1990, approximately 70% of the Valley's population was classified as rural. Only about 1.1% of Pueblo's economy is based on agriculture. As reflected by the 1990 Census, the socioeconomic status of Hispanics in the Valley is generally lower than that of Hispanics living in Pueblo and Trinidad. Pueblo has endured significant erosion of its industrial base, but has become successful in attracting new, cleaner, light industry and creating new economic development. (Testimony of Representative Romero; Defendants' Exhibits V, W, and Y).

Judged by the principles of contiguity, preservation of communities of interest, and minimizing the splitting of counties and municipalities, the proposed alternative H.D. 60 is not compact. First, the Plaintiffs' proposed alternative H.D. 60 does not score well on mathematical tests for compactness. (*See* Defendants' Exhibits 2C, 2E pp. 6-7 for explanation of mathematical test methods). H.D. 60 has the largest total perimeter of any current Colorado House district. It scores the lowest on the Schwartzburg test of any district in Colorado, with a score of 3.3736, significantly below the next lowest score in the State. It scores fourth lowest in the State on the Reock test, with a score of 25.47. Judged by mathematical tests for compactness, the proposed alternative H.D. 60 is not compact. (*See* Defendants' Exhibits 2E pp. 6-7, 2F, 2G).

Second, the current H.D. 60 splits only one county and no municipalities. The Plaintiffs' alternative H.D. 60 splits all seven counties in its proposed district (Saguache, Alamosa, Conejos, Costilla, Rio Grande, Las Animas, and Pueblo), three cities (Alamosa, Trinidad, and Pueblo), and some Pueblo precincts. (Defendants' Exhibits 2R, 2U, 2Y, and 2Z). Plaintiff's proposed alternative H.D. 60 cuts

across county lines, municipal boundaries, precinct boundaries, political boundaries, and communities.

Third, "communities of interest" represent distinctive units that share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socioeconomic status, or trade. *Carstens v. Lamm*, 543 F.Supp. 68, 91 (D.Colo.1982). The Valley is home to the San Luis Valley County Commissioners Association, Peace Officers' Association, and Bar Association. The Valley comprises a single judicial district, has a centralized law enforcement system, and Valley residents almost unanimously opposed the AWDI water development project. The Plaintiffs' proposed H.D. 60 splits the Valley, an identifiable community of interest.

Fourth, the Plaintiffs' proposed H.D. 60 is not contiguous. A district qualifies as contiguous if every part of the district is reachable from every other part without crossing the district boundary, *i.e.*, the district is not divided into two or more discrete pieces. Grofman, Bernard, *Criteria for Districting*, 33 UCLA L.Rev. 77, 84 (1985). A resident of the proposed H.D. 60 would be required to travel outside the district to get from the Valley to Pueblo.

Fifth, the proposed H.D. 60 would erode the number of political offices held by Hispanics in the Valley and in the adjacent districts. The districts of Representatives Salaz and Romero would necessarily contain fewer Hispanic voters. Representatives Salaz and Romero presently receive substantial political support from Hispanics. Sheriff Medina would be precluded from running for reelection for his current office as Sheriff of Rio Grande County because his residence is not in the proposed alternative H.D. 60.

Sixth, the Plaintiffs' proposed H.D. 60 would impede effective political representation. (Testimony of Representative Romero, Representative Salaz, Representative Entz, Sheriff Medina, and Selso Lopez). House Representatives Romero, Salaz, and Entz expressed concern about: (1) the difficulty of meeting with constituents in such a large, geographically dispersed district, (2) the possibility that the Valley could be represented by someone not from the Valley and Pueblo could be represented by someone not from Pueblo, and (3) the risk that Hispanic repre-**[p. 1526]**sentation could be significantly reduced in the adjacent House districts (H.D. 47 has had a Hispanic representative for more than ten years; Representative Romero has represented H.D. 46 for 5 terms (*see* Plaintiffs' Exhibit 8)). The current Representatives expressed concern that Pueblo's more urbanized interests could actually be at odds with the Valley's more agricultural interests.

[8] Based on all of the above considerations, the court concludes that the Plaintiffs cannot meet their burden of proving the first *Gingles* precondition to a § 2 challenge: that the minority group is sufficiently large and compact such that a majority Hispanic district is feasible. The Plaintiffs' proposed H.D. 60 would split the Valley, diluting the political power of the Valley as a whole and Hispanics' political power within the Valley. The Plaintiffs' proposed H.D. 60 would pit the political interests of Pueblo residents against the political interests of Valley residents. Hispanics in the Plaintiffs' proposed alternative H.D. 60 do not all have the same economic, political, and social interests. The proposed alternative H.D. 60 would impede effective representation for all Hispanics in South Central Colorado.

Because the Plaintiffs have not established the first of the three "necessary preconditions" from *Gingles*, the court need go no further in its analysis. *See DeGrandy*, --- U.S.

at ----, 114 S.Ct. at 2657, quoting *Gingles*, 478 U.S. at 50, 106 S.Ct. at 2766; *Sanchez*, 875 F.2d at 1492, citing *Gingles*, 478 U.S. at 50, 106 S.Ct. at 2766. In the absence of a showing that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district, the minority voters' inability to elect their preferred candidate cannot constitute a violation of § 2. *DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2657; *Growe*, 507 U.S. at ----, 113 S.Ct. at 1084; *Lee*, 994 F.2d at 1146, citing *Gingles*, 478 U.S. at 50, 106 S.Ct. at 2766. However, in the interests of judicial economy, the court will address the second and third *Gingles* preconditions and the totality of the circumstances inquiry.

2. The Second and Third *Gingles* Factors: Political Cohesiveness of Minority Group and Racial Bloc Voting

[9] The purpose of inquiring into the existence of racially polarized voting is twofold: (1) to ascertain whether minority group members constitute a politically cohesive unit, and (2) to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769 (citation omitted). Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769. The Supreme Court has unanimously reaffirmed that minority-group political cohesion and racial bloc voting never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2. *Shaw*, --- U.S. at ----, 113 S.Ct. at 2830, citing *Growe*, 507 U.S. ----, ----, 113 S.Ct. 1075, 1076, 122 L.Ed.2d 388 (1993); *Sanchez*, 875 F.2d at 1492, citing *Gingles*, 478 U.S. at 45-46, 106 S.Ct. at 2763-2764.

[10, 11] Racially polarized voting exists when there is a consistent relationship between the race of the voter and the way in which the voter votes or, in other words, where minority voters and white voters vote differently. *Sanchez*, 875 F.2d at 1493, citing *Gingles*, 478 U.S. at 53 n. 21, 62-63, 106 S.Ct. at 2768 n. 21, 2772-2773. The race of the candidate *per se* is irrelevant to a racial bloc voting analysis. Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important. *Gingles*, 478 U.S. at 67-68, 106 S.Ct. at 2774-2775 (emphasis in original). Nothing in § 2 indicates that the chosen representative of a minority group must be a minority. *Sanchez*, 875 F.2d at 1495. The Plaintiffs must prove on an election-by-election basis, by a preponderance of the evidence, which candidates are minority-preferred. *Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103, 1126 (3d Cir.1993), *cert. denied*, --- U.S. ----, 114 **[p. 1527]** S.Ct. 2779, 129 L.Ed.2d 891 (1994) (citation omitted).

[12, 13] Legally significant white bloc voting occurs where, in the absence of special circumstances, the white bloc vote normally will defeat the combined strength of minority votes plus white "crossover" votes. *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766; *Sanchez*, 875 F.2d at 1492, citing *Gingles*, 478 U.S. at 50-51, 106 S.Ct. at 2766-2767. The degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances, so there is no simple doctrinal test for the existence of legally significant racial bloc voting. The amount of white bloc voting that can generally "minimize or cancel" minority voters' ability to elect representatives of their choice will vary from district to district according to a number of factors, including: (1) the nature of the allegedly dilutive electoral mechanism; (2) the presence or absence of other potentially dilutive electoral

devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; (3) the percentage of registered voters in the district who are members of the minority group; and (4) the size of the district. *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769.

[14] The Plaintiffs argue that, in determining whether in fact the minority group votes cohesively, court may not consider the reasons why minority voters may vote alike, citing *Sanchez*, 875 F.2d at 1493. The Plaintiffs asserted repeatedly at trial that the court may not consider any factors other than the race of the voter and the selection of certain candidates in determining whether racially polarized voting exists. However, the court believes it is permitted to undertake the additional inquiry into the reasons for, or causes of, voting behavior. *See DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2657; *League of Latin American Citizens v. Clements (LULAC)*, 999 F.2d 831, 853-54 (5th Cir.1993), *cert. denied*, --- U.S. ----, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994). The Court in *DeGrandy* directs that lack of equal electoral opportunity under § 2 must "be addressed explicitly, without isolating any other arguably relevant facts from the act of judgment." --- U.S. at ----, 114 S.Ct. at 2657. "The ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2657. *DeGrandy* requires consideration of "comprehensive, not limited facts" that are "arguably relevant." --- U.S. at ----, 114 S.Ct. at 2657. Under the reasoning of *DeGrandy*, this court believes it is permitted to examine any "arguably relevant" reasons for voting behavior. --- U.S. at ----, 114 S.Ct. at 2657. Accordingly, without "explaining away" racial bloc voting with any one reason for voting behavior, *see Sanchez*, 875 F.2d at 1493, the court will not restrict its examination to Dr. Bardwell's bivariate analysis, but will

also consider Dr. Zax's multivariate analysis. *See (LULAC)*, 999 F.2d at 853-54.

Both the statistical evidence (Defendants' Exhibits S, T, and 2Q) and the lay witness testimony established that many factors influence voting behavior and electoral success in H.D. 60. Although the Plaintiffs assert that their only real candidate of choice must be a Hispanic Democrat, witnesses for both the Plaintiffs and the Defendants acknowledged that many different considerations influence their votes. There is substantial evidence that the following factors have influenced voting patterns in H.D. 60: (1) party affiliation of the candidate; (2) incumbency of the candidate; (3) the candidate's track record, if any, in political office; (4) the candidate's platform; (5) the candidate's name recognition in the Valley; (6) campaign strategy; (7) campaign finances; (8) effort put into campaigning and time spent campaigning door-to-door; (9) personal characteristics of the candidate, including qualifications, reputation, speaking ability, residence, family ties, gender, personal popularity, ethnicity, and visibility in the community; (10) identification of the candidate with past political scandals; and (11) the voter's ethnicity.

The evidence demonstrated that while Hispanics in H.D. 60 vote cohesively on some issues of particular universal interest, Hispanics vote differently on other issues and candidates. Approximately 20% of Hispanics **[p. 1528]** in H.D. 60 are registered as Republicans and 80% as Democrats. Approximately 56% of Anglos in H.D. 60 are registered as Republicans and 44% are registered as Democrats. Approximately 16% of the voters in H.D. 60 are registered Independent. Numerous Hispanic Valley residents and voters testified that their political interests are not the same as the political interests of the Plaintiffs. Hispanics in the Valley cannot be classified as one distinct political group with the same political interests.

[15] The Colorado Reapportionment Commission relied on data that approximately 20% of Anglo voters in the Valley "cross over" to vote for the Hispanic candidate-of-choice. Dr. Bardwell estimated a white crossover vote of 13%-17%. Based on the Anglo crossover vote and all the evidence, statistical and anecdotal, the court concludes that the Plaintiffs have not proven that a legally significant white bloc vote normally defeats the combined strength of minority votes plus white "crossover" votes.

The court found other significant problems, flaws, and deficiencies in the Plaintiffs' statistical conclusions regarding Hispanic political cohesiveness and white bloc voting. But, the court need not explore those concerns in depth at this time. Under *DeGrandy*, even if the court assumes that the Plaintiffs have proved each and every one of the three *Gingles* preconditions, the court must go on to make a "totality of circumstances" determination. --- U.S. at ---- - ----, 114 S.Ct. at 2656-58.

3. The Totality of Circumstances Inquiry

[16] Throughout the trial, the Plaintiffs argued that it is almost impossible to lose a § 2 challenge on the totality of circumstances inquiry when the three *Gingles* preconditions have been met. The Supreme Court has stated otherwise in *DeGrandy*, --- U.S. at ---- - ----, 114 S.Ct. at 2656-58. *Gingles* "clearly declined" to hold the three preconditions sufficient in combination to prove a § 2 claim, "either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *DeGrandy*, --- U.S. at ----, 114 S.Ct. at 2657. Accordingly, the court must proceed to the "totality of circumstances" inquiry.

[17] Again, the Senate Report list of nine factors to consider is not exclusive--the court may consider any relevant factors in reaching its conclusion and no particular number of factors need be proved. *Sanchez*, 875 F.2d at 1492, citing *Gingles*, 478 U.S. at 46, 106 S.Ct. at 2764. Whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality and upon a functional view of the political process. *Sanchez*, 875 F.2d at 1492, citing *Gingles*, 478 U.S. at 46, 106 S.Ct. at 2764. A § 2 violation may be found only if the challenged practice operates to deny the minority plaintiffs an equal opportunity to participate in the political process and to elect candidates of their choice. *Lee*, 994 F.2d at 1147 (citation omitted).

a. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, vote, or otherwise to participate in the democratic process;

The evidence revealed that Hispanics in South Central Colorado, like many other ethnic groups in the United States, have experienced certain social, economic, and political effects of discrimination. The only evidence of "official" discrimination, however, involved activity by the Clerk and Recorder of Saguache County approximately eighteen years ago. The State properly pursued an investigation into his alleged activities and the situation was ultimately corrected. While the Plaintiffs perceived the English Only Amendment in 1988 to be based on discriminatory motives, the Amendment was soundly defeated by a solid coalition of Hispanic and Anglo voters. The only recent allegation of "official" discrimination involved the loss of some Hispanic voter registrations in approximately 1986. (Testimony of Jennie Sanchez).

b. the extent to which voting in the elections of the state or political subdivision is racially polarized;

When the Plaintiffs' allegations of racially polarized voting are evaluated by the multi-**[p. 1529]**variate analysis, the evidence reveals that, while ethnicity plays a role in voting behavior, it is only one of many other factors that contribute to voting behavior. Taking into account the problems with Dr. Bardwell's bivariate analysis (overly restrictive bivariate analysis, statistical bias, use of 1990 census data, type of races analyzed too narrowly defined, use of absentee ballots, underestimated impact of white crossover votes, failure to consider impact on adjacent districts, and the occurrence of impossible estimates, among others), the court is not convinced that the evidence specifically proves legally significant racially polarized voting in H.D. 60. (*See* part C. 2. of this Memorandum Opinion and Order).

c. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

The parties did not introduce any evidence as to this factor.

d. if there is a candidate slating process, whether the members of the minority have been denied access to that process;

The parties did not introduce any evidence as to this factor.

e. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health,

which hinder their ability to participate effectively in the political process;

According to the 1990 Census data, Anglos in the Valley have higher education and income levels than Hispanics, as well as lower unemployment and poverty rates than Hispanics. In the ten years between the 1980 Census and the 1990 Census, unemployment and poverty rates for Hispanics have remained stable, while unemployment and poverty rates for Anglos have increased. According to estimates, Hispanics in H.D. 60 turn out to vote at rates only slightly less (1%) than non-Hispanics. (Testimony of Dr. Bardwell). Hispanic voter registration is virtually equal to Anglo voter registration. Hispanic voter turnout in H.D. 60 is substantial; equivalent to Anglo voter turnout rates statewide and twice as high as Hispanic voter turnout rates statewide.

Many Hispanic long-time residents of the Valley testified at the trial that H.D. 60 does not dilute Hispanic voting power. They testified that, while racial discrimination was more prevalent in the Valley in the past, today Hispanics have equal access to education, jobs, and loans. Hispanics are teachers, business owners, elected officials, and party officials. The Plaintiffs themselves have been successful in establishing convenient voter registration hours and in substantially increasing Hispanic voter registration and turnout. Even assuming that Hispanics in the Valley have borne the effects of past socioeconomic disparities, the evidence demonstrates that any past discrimination does not significantly impede Hispanics' ability today to participate effectively in the political process in H.D. 60.

f. whether political campaigns have been characterized by overt or subtle racial appeals;

Plaintiffs rely on evidence of a few comments made in the past by private individuals. Some of these allegedly discriminatory comments were hearsay, some were made anonymously, and some were so remote in time as to carry little weight. The Plaintiffs also rely on the publication of a list of absentee voters by a local newspaper as the most recent overt racial appeal against Hispanic voters. As the identity of absentee voters is a matter of public record, this incident carries little weight.

g. the extent to which members of the minority group have been elected to public office in the jurisdiction;

The evidence indicated that Hispanics experience no serious impediments to participating in the political process today. Hispanics in H.D. 60 actively participate in the Democratic and Republican parties. Hispanics control the Democratic party in the Valley. Hispanics have run for and been elected to numerous political offices in the Valley. Hispanics are elected and appointed to local, county, and state-level boards, commissions, **[p. 1530]** and offices. The evidence shows that Hispanics have served and continue to serve on local school boards, in local mayoral offices, on rural electric boards, on boards of county commissioners, in sheriff's offices, and in other county offices.

Hispanics in H.D. 60 are active participants in both the Republican and Democratic parties. Hispanics have been delegates to Republican and Democratic state and national conventions. One of the Plaintiffs has held political office in the Valley and two of the Plaintiffs have held office in the Democratic party. The Plaintiffs have conducted successful campaigns to improve Hispanic voter registration, Hispanic voter turnout, and Hispanic absentee voting. While the Plaintiffs' Hispanic Democratic candidates of choice have not yet won the H.D. 60 representative seat, the Plaintiffs' Hispanic Democratic candidates of choice have consistently

been nominated by the Democratic party and won the Democratic primaries. (Testimony of Jennie Sanchez).

h. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

While the Plaintiffs point to evidence that several local public officials in H.D. 60 have been non-responsive to particularized Hispanic needs, the court believes that evidence of the responsiveness of H.D. 60's state legislator is the most probative. The Plaintiffs' primary criticisms of Representative Entz are that he did not speak out strongly enough against the English Only Amendment, he did not speak out strongly enough in favor of bilingual education for non-English speaking children, and he does not attempt to meet and talk with Democrats in Center. (Testimony of Jennie Sanchez). The evidence indicates, however, that Representative Entz has been responsive to the needs of all his constituents, including Hispanics. Representative Entz has worked on education issues, housing issues, and economic development issues. He worked against the English Only Amendment, has worked to obtain funding through grants for local governments within H.D. 60 (Defendants' Exhibit B), has worked on a 1994 school financing act to obtain equality in school financing, and has helped constituents obtain jobs. Representative Entz has supported Hispanic candidates for office, has worked on a Scenic Byway designation, has supported the Cumbres & Toltec Railroad enterprise, and has worked in cooperation with the Hispanic representatives in the Legislature. Entz sees the most important issues for H.D. 60 as economic development, education, and water. He has worked continuously to attract agriculturally based entities to H.D. 60.

i. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous;

There is no evidence that the State's asserted reasons for drawing and defending H.D. 60 are maintained on a tenuous basis as a pretext for discrimination. The evidence shows that the Colorado Reapportionment Commission followed the dictates of § 2 in drawing H.D. 60 from the beginning to the end of the reapportionment process. H.D. 60 as currently drawn actually increased the Hispanic voting age population by more than 5% over the previous district. After numerous meetings and public hearings, where sentiment was overwhelming to keep the Valley politically whole and intact, the Commission adopted H.D. 60 as currently drawn and the Colorado Supreme Court approved it over objections similar to those brought by the Plaintiffs here. Reapportionment is certainly always a delicate balancing act between the Voting Rights Act and many other considerations. It cannot properly be said that the State's reasons for drawing H.D. 60 were tenuous.

D. *Conclusion*

Under the Plaintiffs' theory of this case, "votes that do not control a representative are essentially wasted; those who cast them go unrepresented and are just as surely disenfranchised as if they had been barred from registering.... Such conclusions, of course, depend upon a certain theory of the 'effective' vote, a theory that is not inherent in the concept of representative democracy itself." *Holder*, --- U.S. at ----, 114 S.Ct. at 2595 **[p. 1531]** (Thomas, J., concurring in the judgment). The Plaintiffs' position gives "credence to the view that race defines political interest." *Id.* --- U.S. at ----, 114 S.Ct. at 2597. The Plaintiffs position leads us "towards a system that is

indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race." *Id.* --- U.S. at ----, 114 S.Ct. at 2598. The Plaintiffs would have the court assume "that members of the racial group must think alike and that their interests are so distinct that the group must be provided a separate body of representatives in the legislature to voice its unique point of view. Such a 'system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant.' " *Id.* --- U.S. at ----, 114 S.Ct. at 2599, citing *Wright v. Rockefeller*, 376 U.S. 52, 67, 84 S.Ct. 603, 611, 11 L.Ed.2d 512 (1964). Such a system generates "antagonisms that relate to race or religion rather than to political issues ...; communities seek not the best representative, but the racial or religious partisan." *Id.* --- U.S. at ----, 114 S.Ct. at 2599, citing *Wright*, 376 U.S. at 67, 84 S.Ct. at 611. As a practical political matter, the Plaintiffs' urging "to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions." *Id.* --- U.S. at ----, 114 S.Ct. at 2599. The Plaintiffs' theory of the case reflects, as Justice Thomas more ably describes:

> "only one possible understanding of effective exercise of the franchise, an understanding based on the view that voters are 'represented' only when they choose a delegate who will mirror their views in the legislative halls.... But it is certainly possible to construct a theory of effective political participation that would accord greater importance to voters' ability to influence, rather than control, elections. And especially in a two-party system such as ours, the influence of a potential 'swing' group of voters composing 10%-20% of the electorate

> in a given district can be considerable.... Some conceptions of representative government may primarily emphasize the formal value of the vote as a mechanism for participation in the electoral process, whether it results in control of a seat or not.... Under such a theory, minorities unable to control elected posts would not be considered essentially without a vote; rather, a vote duly cast and counted would be deemed just as 'effective' as any other. If a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections."

Id. --- U.S. at ---- - ----, 114 S.Ct. at 2595-96.

Treating equal political opportunity as the focus of the inquiry and examining the three *Gingles* preconditions and the totality of the circumstances, the court concludes that H.D. 60 as presently drawn does not deny Hispanic voters equal political opportunity under the meaning of § 2 of the Voting Rights Act.

Accordingly,

IT IS ORDERED that judgment is entered in favor of the Defendants and against the Plaintiffs on the complaint alleging violation of § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JENNIE SANCHEZ, ADELINE SANCHEZ, DEBRA CASANOVA, Plaintiffs - Appellants, v. STATE OF COLORADO; NATALIE MEYER, in her official capacity as Secretary of State of the State of Colorado, Defendants - Appellees, - - - - - - - - - - - THE PUEBLO CHICANO DEMOCRATIC CAUCUS, COLORADO HISPANIC BAR ASSOCIATION MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, Amici Curiae.	)	No. 94-1471

ORDER
Entered November 29, 1996

Before SEYMOUR, Chief Judge, LOGAN, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, Circuit Judges, and O'CONNOR*, District Judge.

*The Honorable Earl E. O'Connor, Senior District Judge for the United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate **[P. 2]** Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk
By: /s/
Deputy Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 14, 1997

Mr. Maurice Knaizer
1525 Sherman St., 5th Floor
Denver, CO 80203

Re: Colorado and Natalie Meyer, Secretary of State of Colorado v. Jennie Sanchez, et al. Application No. A-588

Dear Mr. Miller:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on February 14, 1997, extended the time to and including March 14, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/
Melissa A. Blalock
Assistant Clerk

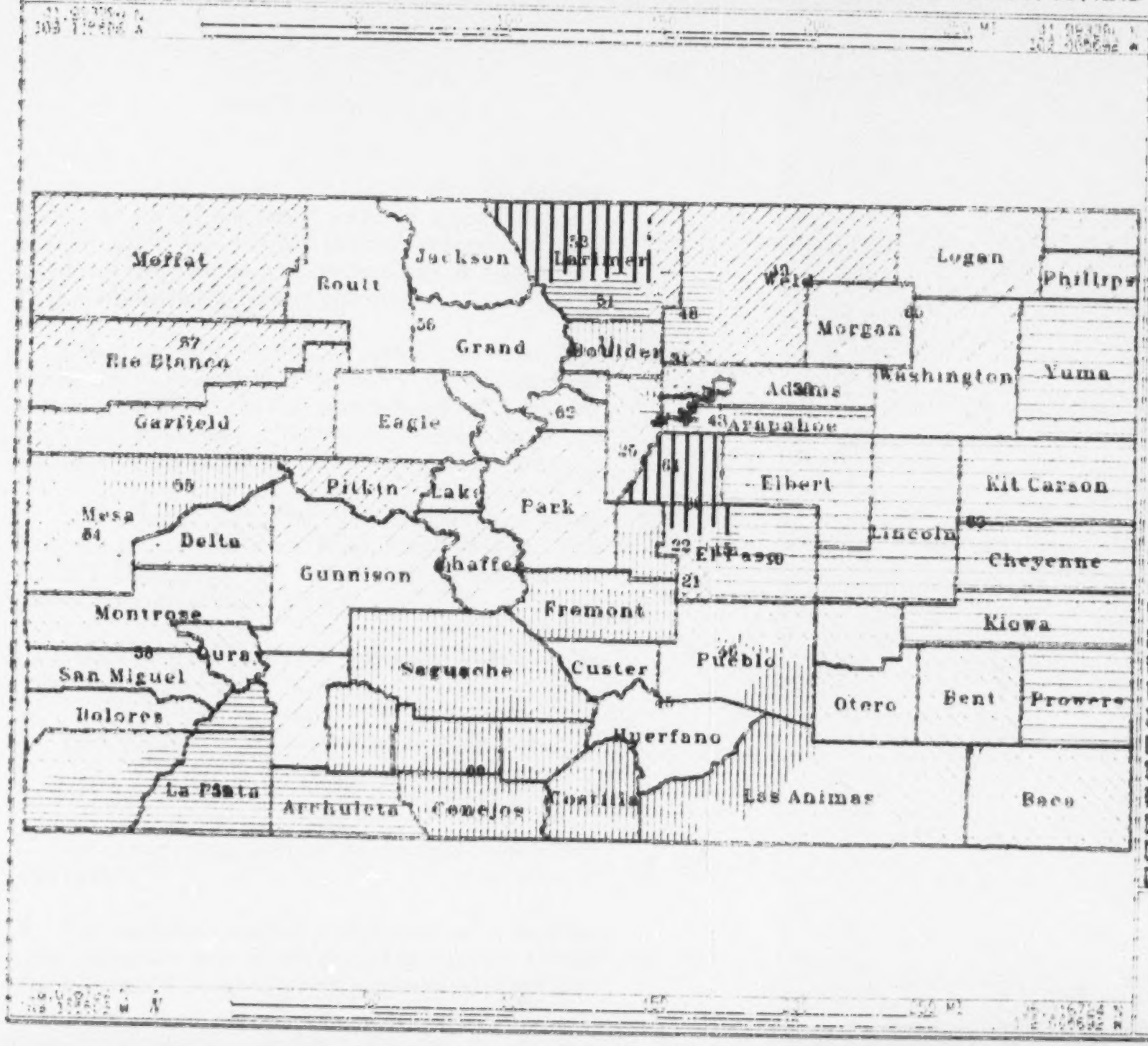
BEST AVAILABLE COPY

APPENDIX E

Colorado Legislative Council

SANCHEZ ALTERNATIVE WITH ADJUSTMENTS TO DISTRICTS 44, 45, AND 47

December 9, 1993



Colorado Legislative
Council
029 State Capitol Bldg
Denver, CO 80203

ATTACHMENT C

APPENDIX F

* * *

DIRECT - GARCIA

[P. 1014]
significant spot because tens of thousands of people visit that place, and we did not feel it would be appropriate for a highway that's honoring the Hispanic culture in a very significant place for us to be cluttered up with a gravel pit. I felt -- we felt this to be very offensive.

Lewis appeared with me -- pardon me. Mr. Entz appeared with me in front of the county commissioners and in front of the Mine Land Reclamation Board and fought that every step of the way. Ultimately, we prevailed on the expansion of this gravel pit, but it's due to Lewis Entz.

Other issues. Mr. Entz, for example, is a strong supporter of the Cumbres and Toltec Scenic Railway. That provides employment and downstream for hundreds of people, primarily Hispanic people.

THE COURT: That's how you get to Chama on the train.

THE WITNESS: Right, Chama. Take the train.

BY MR. KNAIZER:

Q. Are there organizations or districts which are valleywide?

A. Yes, there are a number of organizations. I think the most important one is our San Luis Valley County Commissioner Association which, you know, also serves as

a transportation planning region board, in essence. More about that later. There is the -- San Luis Valley has one judicial district. It has one board of cooperative services.

Q. What is a board of cooperative services?

[P. 1015]

A. It's basically an association of school boards throughout the San Luis Valley. They band together to get funding from the Department of Education for the chapter programs, for language programs, and handicap programs and that sort of thing. It's one unit.

Q. Any other boards that you can recall?

A. Well, there's a number of boards. There's a San Luis Valley Cattleman's association which is not a governmental board. I believe we had the Colorado Wool Growers Association at one time in the San Luis Valley. We have a Potato Growers Association.

Every facet of our life, sir, is basically -- we're unitized in the San Luis Valley. We have the San Luis Valley Peace Officers Association, San Luis Valley Bar Association. There's a medical association. We're a knot. I mean, our interests are so intertwined that we cannot escape one from the other.

I mean, a classic example of this is the water issue where we -- 97 percent of the people of the San Luis Valley taxed ourselves. We taxed ourselves to pay lawyers, two of the most unpleasant things you can ever think of doing, paying taxes and paying lawyers. I don't know which is worse. Let's hope the other lawyers don't hear this.

Q. Go ahead. I'm sorry.

A. But anyway, the sole exception to this 97 percent . . . .

* * *

APPENDIX G

* * *

CROSS - GOMEZ

[P. 923]
A. How long ago was that?

THE COURT: I assume if she wants to testify about that, she can.

MR. MILLER: Okay.

THE COURT: This is a little bit of a back door way of getting that information in evidence.

BY MR. MILLER:

Q. One last question.

A. Sure.

Q. Alamosa High School, it's in the same conference with Trinidad, isn't it?

A. Yes, it is.

Q. And La Junta, Lamar?

A. La Junta, Lamar, correct.

MR. MILLER: Thank you very much. No further questions.

MS. McCLOUD-CHAN: I have no further questions, Your Honor.

THE COURT: Transportation in and out of the valley, how does it generally -- what is the general flow of transportation routes in and out of the valley?

THE WITNESS: Are you talking about public transportation or just routes out?

THE COURT: Yeah, routes in and out, how do most people go, where do they go.

[P. 924]

THE WITNESS: Okay. The primary routes of transportation outside of the valley to the east and the west is Highway 160 -- Highway 160 going west.

THE COURT: East over to Walsenburg, right?

THE WITNESS: Right. And west to Pagosa Springs. North is Highway 285 exiting San Luis Valley at the Pancha Pass and into the Arkansas Valley. South is 285 exiting the valley at San Antonio --

THE COURT: Espanola and that --

THE WITNESS: Right. The easiest route to travel in the wintertime for the most part is the southern route. Consequently, we do a lot of our shopping in the Albuquerque/Santa Fe area.

THE COURT: So where do people in the valley generally gravitate -- say, for instance, if they're traveling to a center to shop, do they generally come up 285 to Denver, go up -- go over 160 and up to 25 to Pueblo? Where do they generally -- or south to Albuquerque?

THE WITNESS: I think they tend to gravitate in all directions. There's a lot of people from the San Luis Valley

here in Denver, and a lot of them come up here and stay with their families. The valleywide health program, which is the primary health care program, the services for medically indigents, there's no hospitalization in their funding. So when they refer medically indigents to a hospital, they're **[P. 925]** usually referred to the University of Colorado Health Sciences Center and to Denver General because they receive federal funding to help the medically indigent population. A lot of that traffic comes up here. The biggest -- the majority of the veterans that are down there -- there's a lot of them -- the main veterans center is here on Colorado Boulevard, and there's another veterans center a lot of them go to in Grand Junction.

THE COURT: Grand Junction.

THE WITNESS: And a lot of them use the veteran center in Albuquerque.

THE COURT: What happened to St. Joseph's?

THE WITNESS: St. Joseph's Hospital? It closed primarily because of low utilization.

THE COURT: What happened to all of those people who were being served by that?

THE WITNESS: The Regional Medical Center in Alamosa has recently expanded. I believe that that bed capacity has been increased by about 30 beds. That's a guess.

THE COURT: That's just a question of curiosity more than anything else.

THE WITNESS: So those people are now -- they have the capacity between that hospital and the Conejos County

Hospital to basically service those people that were receiving their care in St. Joseph's Hospital.

[P. 926]

There had always been a concern in the valley that we I were overbedded. This is going back to the -- I forget the name of the program that used to fund the hospitals. And when the HMO came in and started developing utilization contracts, per diem contracts with those hospitals, utilization was under review. And the average stays per hospitalization started going down, and the census dropped for the hospital Monte Vista and Del Norte, and it eventually went out of business and --

THE COURT: You've got a lot of expertise in the hospital -- HMO, hospital area.

THE WITNESS: Yes, I do. I was a health planner for the Office of Economic Opportunity in New Mexico. I'm a graduate of the officer advanced course in Medical Service Corps from the Health Sciences Academy in San Antonio, Texas. I've been working as a Medical Service Corps officer primarily since 1977. I'm currently enrolled in command general staff center, also.

THE COURT: Since you've got a lot of expertise in that area, is most of the valley health care gravitating now into Alamosa --

THE WITNESS: Most of the valley --

THE COURT: -- since St. Joseph's is gone?

THE WITNESS: Right. Most of the valley health care is now gravitating towards Alamosa. As I say, they've [P. 927] expanded a regional medical center there. Also, the Medical Professional Corporation just built several thousand

square foot new complex area next to the old K-Mart store --

THE COURT: Um-hum.

THE WITNESS: -- and they have expanded their ancillary services, their tertiary care capability by doing that and have brought more and more specialties in so that Alamosa is quickly becoming the medical care hub for the valley.

THE COURT: Doctors and nurses.

THE WITNESS: Doctors, nurses, specialty care. There's been an increase in board-certified specialties that didn't exist before. There is a good working relationship also between the medical center and Valleywide Health Services which has clinics and physicians throughout the valley that service medically indigent families on a sliding-scale basis.

THE COURT: They're sort of a spoke out to clinical health care services, aren't they? Alamosa.

THE WITNESS: Yes, sir. It's a wagon wheel spoke. When Mr. Paul Herman designed that facility, he put an emergency medical communication center in there, and we developed through the health care foundation -- San Luis Valley Health Care Foundation, we developed a communication network so that we could update all of the ambulance -- all of the communications equipment in those ambulances.

[P. 928]

We put relay stations on the top of San Antonio Valley, on the top of Ramon Mountain and La Veta Pass so that basically all of those ambulances in the valley across the board are now in communication with that emergency --

THE COURT: Community health service in Alamosa --

THE WITNESS: Right.

THE COURT: -- in Alamosa.

THE WITNESS: For emergency health care. We've eliminated a lot of this duplication with people going in different directions with EMS patients. And primarily, there's better communication.

THE COURT: Alamosa has always been the spoke of the valley --

THE WITNESS: That's right.

THE COURT: -- or hub of the valley.

THE WITNESS: For education --

THE COURT: The college, the health services.

THE WITNESS: -- health services, banking. Although the banking now -- because branch banking is starting to spread out through the various communities of the valley.

THE COURT: Where is the airport at?

THE WITNESS: The airport is Bergman Airfield. It's 24 located --

THE COURT: Between Alamosa and Monte Vista.

THE WITNESS: No. It's located just south of **[P. 929]** Alamosa.

THE COURT: South of Alamosa. They did away with

that one in Alamosa.

THE WITNESS: No. It's still there, but it's --

THE COURT: The airlines don't stop there.

THE WITNESS: No. The airlines stop at Alamosa --

THE COURT: What kind of air service do you have?

THE WITNESS: Primarily it's maintenance. United Air Express, something like that. It's a subsidiary of United Airways -- United Airlines. And they do have, like, three or four flights a day in and out of there to Denver.

THE COURT: Connecting service out of the valley is generally from the valley to Denver, from the valley to Farmington, from the valley to Durango. And you don't even have connecting service to Grand Junction, do you?

THE WITNESS: No. Or go to Farmington and go on Mesa Airlines. There is connecting Service to Pueblo. That's kind of hit-and-miss.

There is no bus transportation now. Greyhound stopped their route several years ago out of the valley, so there's no ground transportation out of the valley.

THE COURT: No trains.

THE WITNESS: And there's no trains.

THE COURT: Go to Chama.

THE WITNESS: Go to Chama.

[P. 930]
THE COURT: Thank you very much.

THE WITNESS: Thank you.

THE COURT: Anything else as a result of the Court's inquiry?

MS. McCLOUD-CHAN: No, Your Honor.

THE COURT: Stand down, sir. Thank you. I hope you're not too uncomfortable.

THE WITNESS: No, I'm not.

THE COURT: Call your next witness.

MR. KNAIZER: Your Honor, we'd next like to call Representative Gilbert Romero.

GILBERT ROMERO,

called by the defendants, was sworn and testified as follows:

COURTROOM DEPUTY: State your name and spell your last name for the record.

THE WITNESS: My name is Gilbert Edmond Romero. Last name is spelled R-o-m-e-r-o.

DIRECT EXAMINATION

BY MR. KNAIZER:

Q. Mr. Romero, are you a Colorado resident?

A. Yes, I am.

Q. And where do you reside?

A. I reside in Pueblo, Colorado. My address is 1128 Hotalbo (phonetic) Street, Pueblo.

Q. And how long have you been a resident of Pueblo?

* * *

APPENDIX H

ELECTION DATA SERVICES, INC.

October 14, 1991

Outlined below are some generalizations about voting patterns in the San Luis Valley. These conclusions are based on a statistical analysis of selected 1988 and 1990 local elections in San Luis Valley counties performed by Election Data Services, Inc.

A racial bloc voting analysis was also conducted on the only countywide election in Weld County to include a minority candidate in 1988 or 1990. However, this analysis proved inconclusive. A few comments about this Weld County election are offered at the end of this memo.

1. Participation rates in the San Luis Valley area:

Hispanics are, on average, turning out to vote at slightly lower rates than whites in the San Luis Valley. In the counties examined, the average turnout rate (the percentage of the voting age population that turned out to vote) was slightly over 61 percent for whites and 55.6 percent for Hispanics in the 1988 and 1990 countywide elections examined.

If voting in the San Luis Valley was completely polarized (with no white crossover voting for Hispanic-preferred candidates), districts with Hispanic populations slightly over 52 percent Hispanic voting age population would be necessary to insure that Hispanic voters are given an opportunity to elect candidates of their choice. (A 52 percent Hispanic voting age population majority is needed to equalize white and Hispanic turnout given the differences in the turnout rates of whites and Hispanics.)

2. Minority Cohesiveness in the San Luis Valley area:

A large majority of the Hispanic voters in the San Luis Valley tend to support Hispanic candidates (unless those Candidates are Republicans), thus Hispanics are politically Cohesive in the San Luis Valley.

[P. 2]
3. White Bloc Voting in the San Luis Valley area:

Voting in the San Luis Valley appears to be racially polarized, with whites and Hispanics preferring different candidates. This is true in almost every election contest examined in which a Hispanic candidate competed in 1988 and 1990.

The average percentage of white crossover vote (that is, the average percentage of whites voting for Hispanic-preferred candidates) in the countywide elections examined was slightly over 20 percent. Because approximately 20 percent of the white voters in the San Luis Valley can be expected to vote for the Hispanic-preferred candidate, districts created to give Hispanics the opportunity to elect candidates of choice need not be as heavily Hispanic in population as would be the case if voting was completely polarized. (If voting was completely polarized, only districts that equalized Hispanic and white turnout would permit Hispanic. the opportunity to elect candidates of their choice.)

4. Conclusions:

Despite slightly lower turnout rates for minority voters and racially polarized voting, the degree of white crossover vote found in many areas of the San Luis Valley indicates that supermajority Hispanic districts may be unnecessary. However, it should be noted that 'districts in which Hispanics comprise approximately 50 percent of the voting

age population may be required to permit Hispanics the opportunity to elect candidates of their choice. It is necessary to create districts that are more heavily Hispanic in the San Luis Valley than elsewhere in the state because of the degree of racially polarized voting found in this area of the state. It should be noted that this conclusion is based on limited data. Countywide contests in only the 1988 and 1990 general elections were analyzed. Moreover, not all of the counties in the Valley could be examined--a number of counties could not be analyzed due to such limitations as a very small number of election precincts, a small percentage of Hispanic voters or a lack of Hispanic candidates competing for office.

5. Weld County:

A statistical analysis of voting patterns in Weld County yielded estimates of Hispanic voting behavior that were obviously impossible. However, the results of this examination did indicate that voting in Weld County--at least in the only countywide election that included a minority candidate--was polarized and that Hispanics turned out at a lower rate than whites. For these reasons, conclusions reached about the San Luis Valley can be extended to Weld County as well.

APPENDIX I

* * *

[P. 6]

Male ?: It's 49, if you do the total black, not just known Hispanic, it's 49 something, I believe, it's usually about a percent higher. We had a map on the table at one point here, although it looked funny, at 50% and now we're arguing to go down to 45. I just don't understand. Maybe somebody can explain how we need to argue this in the, with the Supreme Court, or if somebody takes this court, how we're going to defend ourselves.

Male 1: I think that there is a big distinction here, in that, you know in both the hearings in Trinidad and in Alamosa, we are reminded that about these communities of interests being so separated by this natural barrier of the southern end in Colorado of the Sangre De Cristo Range. And then we also had almost unanimous Hispanic League support for keeping the Valley whole. And one of the Hispanic League members is here, and maybe, someone should bring the Commission up to date on what happened this weekend with San Luis Valley Hispanic League members coming to Denver, meeting with the State Hispanic League. I believe, I'm not sure, but I believe that there was a new resolution -- that was adopted.

Male ?: Is there anyone here who could respond.

Female ?: I could respond if you'd like me to. And also it's my understanding that, you would agree

with the Ventura 10-H plan, because it does "keep the Valley whole", is that right, Bob?

Male 1: No, I haven't, no, I've never agreed to anything, you know. I'll decide what I'm going to vote on when I see what is presented. I don't know, you know, if we are communicating, through people again, you and I haven't talked about it. Is that correct.

Female ?: Yes. Because I am on the AWDI payroll, as far as I understand, and but when you still make your com meet. But let me tell you about what happened at the Hispanic League meeting this weekend. The San Valley Hispanic League, as you recall at the Alamosa hearings, did take the position that they would support the Pastore Amendment because it did not split the San Luis Valley. At that time the Commission had not considered Bob's plan, because it had not come forward before the hearing. After the [P. 7] hearing, I sat down with him and tried to come up with an alternative that would not split the Valley but raise the Hispanic numbers as high as possible. They came to the Statewide Hispanic League's Board's meeting on Saturday, and requested that the Statewide Hispanic League not conflict with their position because it does run contrary to the state position of maximizing Hispanic opportunity when its possible. There was a long discussion about the question of self-determination and allowing the people in the Valley the opportunity to try and have a Hispanic run in that district without having to suffer the back lash or be ostracized by their community for supporting splitting the Valley, and they felt that in order to maximize

Hispanic opportunity in those districts, that it was necessary to work within their community and to be able to keep the Valley whole but at the same time bring the numbers up as much as possible. So with those two goals in mind, that's what the 10-H plan is that is in your book. It's the way that is the most compact way, and the way to bring the Hispanic numbers up as high as possible without splitting the Valley. It does run directly into the issue of putting Mike Salas in the same district with whoever else is in that district, and bringing the City of Trinidad completely in, so that you do not split a municipality to do that. That's exactly what the questions are that are raised. And I do feel pretty strongly that here we have come down three rungs on this ladder from the highest possible Hispanic numbers, in a district we can draw down there. We did see a map that was 50%. We went to public hearing with one that was 48.8. Now I am willing to come back and say, understanding how the Hispanic community feels down there, but I am willing to even take a step back off of that, and come down to say take Trinidad. I think we will have a very tough time going before the court if you adopt something even less than that, given the EDS report, in the background data, that we have.

Male ?: I think I can explain something here. Just sort of saying where we are and something on what our choices are. Ah, I didn't realize that they were going to be put in here, but the 2 plans that I asked the staff to run, really for my own illustration are in here. One is called "Nichols San Luis Valley H",

APPENDIX J

SUMMARY OF MEETING
COLORADO REAPPORTIONMENT COMMISSION

789 Sherman, Room 200
August 14, 1991

1:40 p.m. -- Urban League

The meeting was called to order by Daniel Ritchie, chairman. Representative Chuck Berry, Edward Garner, Representative Matt Jones, Deedee Mayer, James Monaghan, Gene Nichol, and Peggy Ventura were present. James Johnson and Senators Larry Trujillo and Jeff Wells were excused. Commission staff members were present. Mr. Ritchie introduced guests who were invited to present information related to the Federal Voting Rights Act (FVRA) and its application to the Colorado Reapportionment Commission's duties and responsibilities.

Tom Jenkins, Urban League, testified on the applicability of the FVRA in Colorado. He commented that he would be vigilantly watching the reapportionment process to ensure that there is no "packing, cracking, or stacking" of minorities.

1:50 p.m. -- Colorado Lawyers Committee

Chris Paulson and Dick Freese, co-chairman of the Colorado Layers Committee (CLC), explained that the CLC was affiliated with the National Lawyers Committee for Civil Rights Under Law. Their purpose was to offer assistance to the Commission in an effort to ensure that the requirements of the FVRA and the Colorado constitution are followed (see attachment 1). Mr. Freese explained that he was the past

chairman of the state Democratic party while Mr. Paulson was a former state legislator affiliated with the Republican party in Colorado.

Mr. Paulson asked that the CLC be allowed to have access to the Commission's database so that the CLC could highlight districts with different concentrations of minorities and see how many minority-influenced districts could be drawn. He offered to have CLC review districts drawn and discussed by the commission and emphasized that he was looking at minority-influenced as well as minority-majority districts. Mr. Freese discussed the limited case law regarding reapportionment under the FVRA. He explained that this was the first reapportionment of legislative districts to be performed since the 1982 amendments to the FVRA were adopted. Mr. Freese explained that a voting rights task force had been set up by the CLC to discuss four key legal issues related to reapportionment (see attachment 2).

Chairman Ritchie stated that the Commission needed specific assistance in beginning its process and noted the time constraints faced by the Commission. Mr. Freese responded by saying, with regard to the issue of the undercount, that the FVRA may point toward the use of adjusted data in drawing districts. He added that the Commission might be able to exceed the five percent district population variance limit set in the Colorado constitution while still remaining under the ten percent limit imposed by the federal constitution.

Gene Nichol stated that the Commission was bound by law to follow the **[P. 2]** guidelines set in the Colorado Constitution, especially when those guidelines were stricter than the federal requirements. Mr. Nichol asked Mr. Paulson why he mentioned minority-influenced districts with minority population concentrations of 30 to 40 percent. Mr. Paulson responded that, in his understanding of the FVRA,

the Commission must first look at minority-influenced districts.

Chairman Ritchie asked for specific guidance on where the CLC thought the Commission should begin its work. He asked if they thought the Commission should begin with the undercount or the voting behavior of minorities or some other factor. Mr. Paulson responded that the CLC was waiting for the racial block voting analysis being compiled by Election Data Services and due on August 28, 1991. Mr. Monaghan asked that the CLC provide the Commission with preliminary assistance based on current data and then adjust the information when the voting behavior information becomes available. Mr. Nichol added that he felt the most vital information was population, ethnic breakdown, and registration data which was currently available. Mr. Freese responded that they would begin work immediately.

Mr. Nichol complimented the CLC on its accomplishments and thanked them for offering assistance to the Commission. He also requested that reapportionment staff provide the CLC with data from the Commission's system. Mr. Nichol asked if the data from the most recent Denver mayoral election would be included in the database. He added that the election for mayor in Denver showed that many white voters voted for black candidates.

Mr. Nichol asked that the CLC help the Commission answer the question of what might be the ideal concentration of minorities to ensure minorities have an opportunity to elect representatives of their choice. He wondered whether it would be better to draw one 60 percent-minority district or two 30 percent-minority districts. Mr. Monaghan asked for assistance in drawing minority districts and whether the Commission should begin with population or voting behavior or some other factor. He asked what factors must be in place to be confident of a minority district and how the

various factors should be weighted. Mr. Paulson responded that the CLC was considering all of the above issues but that they were still unresolved.

Mr. Nichol asked whether the CLC thought the Commission was required to actively reapportion districts to maximize minority opportunity to elect candidates of their choice or whether it should be more passive. Mr. Paulson and Mr. Freese reported that it was the position of CLC that the Commission actively seek to reapportion districts to maximize minority opportunity to elect candidates of their choice, even if those candidates are not minorities themselves. They added that objections would certainly be raised if the Commission did not actively pursue that objective.

2:30 p.m. -- Hispanic League

Rosemary Rodriguez, Hispanic League, discussed issues relevant to Hispanics and voting strength in Colorado (see attachment 3). Mr. Nichol asked for the Hispanic League's position on whether it was better to draw one 60 percent-minority district or two 30 percent-minority districts. Ms. Rodriguez reported **[P. 3]** that some Hispanic candidates may be elected in districts that have less than 30 percent Hispanic populations. She gave the example of Rep. Jeannie Reeser who is Hispanic but was elected in a district that is currently only 17 percent Hispanic in population. She added that the required percentages would vary depending on the area of the state. For example, in the Denver metro area 30 percent may be adequate but in Larimer or Weld counties a district might require 40 to 50 percent of its population be Hispanic to elect a Hispanic legislator. She reported that it was the official position of the Hispanic League that no district be drawn with a concentration exceeding 50 percent Hispanics.

Ms. Ventura commented that the 65 percent minority concentration figure sometimes used by the courts need not be applied in this state because of the differences between Colorado and the southern states referred to in case law. Mr. Nichol commented that Ms. Ventura's and Ms. Rodriguez's statements might lead to the conclusion that the Colorado Reapportionment Commission is more at risk to charges of packing minorities into districts than some other states and therefore the Commission must look closely at voting behavior of minority groups.

Ms. Mayer asked about Ms. Rodriguez's comments that the Hispanic League would object to any plan that combined black and Hispanic populations in order to create a minority district. Ms. Rodriguez responded that Hispanics and blacks should not be grouped together because it causes dilution of both minorities' voting strength. Mr. Garner asked what the optimum percentage for concentrations of minorities would be. Ms. Rodriguez reported that she could not give an exact percentage at the time.

Mr. Monaghan asked how the Hispanic League might react if the Commission was forced to group minorities or adopt some other plan to which the Hispanic League objected. Ms. Rodriguez responded that the Hispanic League reserved the right to alter its position based on specific circumstances. Mr. Nichol asked about the Hispanic League's position on the undercount. Ms. Rodriguez responded that the League was waiting on information from the census before stating a position.

2:50 p.m. -- Colorado Black Women for Political Action

Wilma Taylor, President of Colorado Black Women for Political Action (CBWPA), testified that her organization was examining the entire reapportionment process. She reported that she had no recommendations of minority

population concentrations to offer but was working on them. She explained that the goals of her organization during this reapportionment process were to maximize the voting strength of African Americans throughout Colorado and maintain the level of black representation in the legislature. She reported that her organization would provide a position paper on their specific goals in the future. She added that those goals currently involved House Districts 7 and 8 in Denver.

Mr. Garner asked about CBWPA's concern regarding the undercount. Ms. Taylor reported that her organization was waiting on information from the census before stating a position. Ms. Ventura asked about CBWPA's position on districts crossing county boundaries in order to meet equal population criteria. Ms. Taylor answered that her group was in favor of splitting counties in order to maintain a minority community of interest. Ms. Ventura asked staff to provide . . . .

* * *

APPENDIX K

In re Reapportionment of the
COLORADO GENERAL ASSEMBLY.

No. 92SA19.

Supreme Court of Colorado,
En Banc.

March 13, 1992.

Original proceeding was brought to review final reapportionment plan. The Supreme Court, Erickson, J., held that plan satisfied constitutional criteria except for Perry Park community and Pitkin County.

Plan disapproved and remanded with directions.

Lohr, J., filed concurring and dissenting opinion.

Quinn, J., filed concurring and dissenting opinion, in which Mullarkey, J., joined in part.

Mullarkey, J., filed opinion concurring in part and dissenting in part in which Quinn, J., joined.

Vollack, J., filed concurring and dissenting opinion.

Plan approved after remand, 828 P.2d 213.

1. STATES k27(10)

Court's role in reapportionment proceedings is sui generis.

2. STATES k27(10)

Supreme Court's review in reapportionment proceedings must be swift and limited in scope so that elections from new districts may proceed on schedule.

3. CONSTITUTIONAL LAW k225.3(3)

ELECTIONS k12(6)

Constitutional standards Supreme Court must apply in reapportionment proceeding include assurance of equal protection for right to participate in political process and right to vote. U.S.C.A. Const. Amends. 14, 15.

4. STATES k27(1)

Voting Rights Act applies to state reapportionment or redistricting plans. Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973.

5. STATES k27(10)

Supreme Court's evaluation of Voting Rights Act issues in reapportionment case was strictly circumscribed by narrow scope of proceedings, presumption of good faith and validity which must be accorded Reapportionment Commission, nature of evidentiary record before it, and its restricted ability to act as fact finder when material facts are genuinely disputed. Voting Rights Act of 1965, Sec. 2 et seq., as amended, 42 U.S.C.A. Sec. 1973 et seq.

6. CONSTITUTIONAL LAW k225.3(3)

ELECTIONS k12(6)

Final reapportionment plan must be consistent with six parameters (in following hierarchy from most to least important): Fourteenth Amendment Equal Protection Clause

and Fifteen Amendment; Voting Rights Act; constitutional article governing equality of population of districts in each house; constitutional article providing districts may not cross county lines except to meet equality of population of district's requirements and number of cities and towns contained in more than one district must be minimized; constitutional article requiring each district to be as compact as possible and consist of contiguous whole general election precincts; and constitutional article requiring preservation of communities of interest within district. West's C.R.S.A. Const. Art. 5, Secs. 46, 47(1-3); Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973; U.S.C.A. Const. Art. 6, cl. 2; Amends. 14, 15.

7. ELECTIONS k12(7)

Election devices, such as at-large elections are not per se violations of Voting Rights Act section prohibiting voting discrimination. Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973.

8. ELECTIONS k12(3)

Combination of electoral mechanism and lack of proportional representation does not by itself establish voting discrimination in violation of Voting Rights Act. Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973.

9. ELECTIONS k12(9)

Existence of racial bloc voting may not be presumed in voting discrimination action; plaintiffs must prove it. Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973.

10. ELECTIONS k12(9)

Ultimate finding of vote dilution is question of fact subject to appellate review only under clearly erroneous standard. Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973.

11. ELECTIONS k12(9)

If facts material to resolution of vote dilution claim are in genuine dispute, if it appears from record that Reapportionment Commission has made good-faith effort to resolve disputed facts and if Commission has applied correct legal standard to facts it has found, Supreme Court will not reject final reapportionment plan on vote dilution grounds. Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973.

12. STATES k27(5)

[P. 185] Supreme Court declined to overturn Reapportionment Commission's finding that House Districts 7 and 8 for Denver, as drawn on final reapportionment plan, complied with Voting Rights Act vote dilution section given only marginal gains in minority population in those districts under black organization's proposed plan. Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973.

13. STATES k27(5)

Hispanic objectors to reapportionment plan failed to make showing that would have enabled Supreme Court to reject Reapportionment Commission's determination that House District 60, as drawn under final reapportionment plan, complied with vote dilution section of Voting Rights Act; accordingly, plan would not be overturned. Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973.

14. STATES k27(4)

Final reapportionment plan, insofar as it made unnecessary but inadvertent split of community of Pere Park and Douglas County into House Districts 20 and 64, did not comply with constitutional article that dictates that communities of interest within district be preserved. West's C.R.S.A. Const. Art. 5, Sec. 47(3).

15. STATES k27(5)

Reapportionment Commission's explanations for dividing Pitkin County and City of Aspen and further division of Snowmass Village from Aspen did not rise to level of adequate factual showing that less drastic alternatives could not have satisfied equal population requirement of the Constitution and did not provide basis for meaningful judicial review of Commission's decision; accordingly, that part of final plan would be disapproved. West's C.R.S.A. Const. Art. 5, Sec. 46.

16. STATES k27(5)

Reapportionment Commission complied with constitutional requirements for House District 3 despite objection that district did not have to cross Arapahoe County line in manner approved by Commission and that it only did so for political concerns; although objectors alleged that equal population requirements could be met without dividing cities located in Arapahoe County into more than one house district, their ultimate plan divided at least as many cities within Arapahoe County as did final reapportionment plan. West's C.R.S.A. Const. Art. 5, Sec. 47(2).

17. STATES k27(5)

Reapportionment plan splitting Montezuma County did not affect constitutional articles requiring preservation of communities of interest within district and prohibiting districts from crossing county lines except to meet equality of population of district's requirements. West's C.R.S.A. Const. Art. 5, Secs. 47, 47(2, 3).

18. STATES k27(5)

Reapportionment Commission complied with constitutional article prohibiting districts from crossing county lines except to meet equality of population of district's requirements and requiring that number of cities and towns contained in more than one district be minimized when Commission placed Baca County in House District 47. West's C.R.S.A Const. Art. 5, Sec. 47(2).

19. ELECTIONS k12(6)

Constitutional restrictions against splitting of cities in reapportionment plans take precedence over compactness concerns of Constitution. West's C.R.S.A. Const. Art. 5, Sec. 47(1, 2).

20. STATES k27(3)

Senate District 24, as contained in reapportionment plan, did not violate compactness and contiguity requirements of Constitution. West's C.R.S.A. Const. Art. 5, Sec. 47(1).

21. STATES k27(3)

Final reapportionment plan for Senate Districts 32 and 35 did not violate constitutional article requiring preservation of communities of interest within district. West's C.R.S.A. Const. Art. 5, Sec. 47(1, 3).

22. ELECTIONS k12(6)

Political considerations are not improper with respect to reapportionment plan; it is only when partisan factors are allowed importance equal to or greater than proper constitutional criteria that plan is defective.

23. STATES k27(5)

Reapportionment plan which placed Columbine Knolls South area in District 13 was valid under Constitution despite claim that plan did not comply with preservation of communities of interest requirement given that preservation of community of interest had to yield to equality of population requirement. West's C.R.S.A. Const. Art. 5, Secs. 46, 47(3).

24. STATES k27(10)

Requested technical changes in boundaries of final reapportionment plan which were not based on Constitution or federal law were outside scope of Supreme Court's review of final plan. West's C.R.S.A. Const. Art. 5, Sec. 48(1)(e).

[P. 187] Holme, Roberts & Owen, Daniel S. Hoffman, Daniel J. Dunn, Stephen P. Ward, Colorado Reapportionment Com'n, Rebecca C. Lennahan, Denver, for the Colorado Reapportionment Com'n.

Charles H. Richardson, Christopher K. Daly, Aurora, for the City of Aurora.

Luis A. Corchado, Denver, Manuel I. Lopez, Alamosa, Motz, Gonzales and Martinez, Martin A. Gonzales, Alamosa, for the Hispanic League.

Holland and Hart, John C. Barajas, Denver, for the Colorado Hispanic Bar Ass'n.

Steven R. Ruddick, Aurora, amicus curiae, Schmidt and Schmidt, Mark H. Schmidt, Springfield, for Bd. of County Com'rs of Baca County.

Steven G. Keppers, pro se.

Menola N. Upshaw, pro se, Denver, for the Nat. Ass'n for the Advancement of Colored People, Denver Branch.

Dr. Lawrence E. Lewis, pro se, Denver, for the Colorado-Wyoming State Conference Branches of the Nat. Ass'n for the Advancement of Colored People.

Rev. Oscar S. Tillman, pro se, Denver, for the Legal Redress Staff.

Harden, Schmidt, Hass & Haag, P.C., George H. Hass, Assistant Larimer County Atty., Fort Collins, for the Bd. of County Com'rs, Larimer County and Larimer County Clerk and Recorder.

Gerie Grimes, pro se, Denver, for the Colorado Black Roundtable, Inc.

Charles R. Duke, State Representative, pro se, Denver, for House District 20.

Jeanne M. Adkins, State Representative, pro se, Denver, for House Dist. 40.

John M. Ely, Asst. Pitkin County Atty., Aspen, for Pitkin County Bd. of County Com'rs.

Fossum, Hatter & Green, P.C., James Hatter, Cortez, for Bipartisan Committee to Keep Montezuma County Whole.

James D. Robinson, Asst. Adams County Atty., Brighton, for the Adams County Clerk and Recorder, Robert Sack.

Zak, Fox, Pehr and Fuller, P.C., Richard L. Fuller, David W. Pehr, Westminster, for Joan M. Johnson, Sheryl L. Pehr, and Amanda S. Pehr.

[P. 188] Rick DeWitt, Englewood City Atty., Englewood, for the City of Englewood.

Grant, Bernard, Lyons & Gaddis, P.C., Daniel F. Bernard, Suzan D. Fritchel, Longmont, for the Arapahoe County School Dist. No. 1.

Martin R. McCullough, Westminster City Atty., Westminster, for the City of Westminster.

Davis, Graham & Stubbs, Gale T. Miller, Richard A. Westfall, Denver, Pryor, Carney and Johnson, Pamela J. Fair, Englewood, for Jennie Sanchez, Adeline Sanchez & Esther Grant.

Wilma M. Taylor, pro se, Denver, for the Colorado Black Women For Political Action.

Peter Lawrence Vana, Arapahoe County Atty., Darrel L. Matteson, Asst. County Atty., Robert Lembke, Special Asst. County Atty., Littleton, for the Arapahoe County Com'r.

Trimble, Tate and Nulan, P.C., Penfield W. Tate III, Penfield W. Tate II, Bernard L. Black, Jr., Denver, for the Blacks for Fair Reapportionment.

Hayes, Phillips & Maloney, P.C., John E. Hayes, Denver, for the City of Sheridan, and the Individually Named Registered Electors and Elected Officials.

Miller & Delay, P.C., Reese Miller, Westminster, for the Sheridan School Dist.

Davis, Graham & Stubbs, Stephen H. Kaplan, Dan Friesen, Denver, For Michael Henry, Selma Lock, Bob Dean, Fern Osborne, Doug Franssen, Maureen H. Loyacono, Pat Sullivan, Alvin J. Koops, Richard Newlon, Denver Democratic Party, Warren Weston, Helen C. Shreves, Jane Werner, Art Binkley, Joann Ortega, Gail Glover, Jane Craft, Betty Spindler, Bob Goss, Cecily Jones, Judy Mays, Mary Gibson, June & Leonard Hurst.

H. Lawrence Hoyt, Boulder County Atty., Boulder, for Boulder County Clerk and Recorder.

Reta A. Crain, Douglas County Clerk and Recorder, pro se.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Jan Michael Zavislan, Asst. Atty. Gen., Denver, for Natalie Meyer, Secretary of State of Colo.

Larry W. Sarner, pro se.

Justice ERICKSON delivered the Opinion of the Court.

This original proceeding under article V, section 48(1)(e), of the Colorado Constitution requires us to review

the Final Plan submitted by the Colorado Reapportionment Commission (Final Plan) and determine whether the plan complies with sections 46 and 47 of article V.[1] A number

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[1] **Section 48 of Article V of the Colorado Constitution provides, in part:**

> Section 48. Revision and alteration of districts--reapportionment commission. (1)(a) After each federal census of the United States, the senatorial districts and representative districts shall be established, revised, or altered, and the members of the senate and the house of representatives apportioned among them, by a Colorado reapportionment commission consisting of eleven members, to be appointed and having the qualifications as prescribed in this section. Of such members, four shall be appointed by the legislative department, three by the executive department, and four by the judicial department of the state.
>
> ....
>
> (e) Within ninety days after the commission has been convened or the necessary census data are available, whichever is later, the commission shall publish a preliminary plan for reapportionment of the members of the general assembly and shall hold public hearings thereon in several places throughout the state within forty-five days after the date of such publication. Within forty-five days after the completion of such hearings, the commission shall finalize its plan and submit the same to the Colorado supreme court *for review and determination as to compliance with sections 46 and 47 of this article*. Such review and determination shall take precedence over other matters

of **[P. 189]** formal objections to the Final Plan have been filed with this court. Except for the division of Pitkin County into House Districts 57 and 61 and that part of the plan which unnecessarily divides Perry Park, we conclude that the Final Plan satisfies the constitutional criteria. We disapprove the Final Plan and return the plan to the Commission for revision, modification, and resubmission to include the technical corrections to the Larimer County and Boulder County plans and the recommended revision of the plan for Perry Park and for reconsideration of House Districts 57 and 61.

I

[1, 2] The court's role in reapportionment proceedings is *sui generis*. Our review must be "swift and limited in scope so that elections from the new districts may proceed on schedule." *In re Reapportionment of the Colorado General Assembly*, 647 P.2d 191, 194 n.6 (Colo. 1982) ("*In re Reapportionment I* "). "Our role in this proceeding is a narrow one: to measure the present reapportionment plan

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> before the court. The supreme court shall adopt rules for such proceedings and for the production and presentation of supportive evidence for such plan. The supreme court shall either approve the plan or return the plan and the court's reasons for disapproval to the commission. If the plan is returned, the commission shall revise and modify it to conform the court's requirements and resubmit the plan to the court within twenty days. If the plan is approved by the court, it shall be filed with the secretary of state for implementation no later than March 15 of the second year following the year in which the census was taken.

Colo. Const. art. V, Sec. 48 (emphasis added).

against the constitutional standards. The choice among alternative plans, each consistent with constitutional requirements, is for the Commission and not the Court." *Id.* at 194 (footnote omitted).

[3] The constitutional standards we must apply include the assurance of "equal protection for the right to participate in the Colorado political process and the right to vote." *Id.* In reviewing the Final Plan, therefore, we must necessarily take into account federal constitutional standards arising from the Fourteenth[2] and Fifteenth Amendments.[3] See *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964).

In formulating and choosing among alternative plans for reapportionment, the Commission was significantly influenced by considerations arising from section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. Sec. 1973 (1988). Moreover, two separate objections have

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[2] Section 1 of the Fourteenth Amendment provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, Sec. 1.

[3] The Fifteenth Amendment provides in part that "[t]he right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV.

been raised by individuals and organizations that the Final Plan itself violates section 2 of the Voting Rights Act.

[4, 5] Article V, section 48(1)(e), does not explicitly authorize or require this court to determine if the Final Plan conforms to section 2 of the Voting Rights Act. However, the Voting Rights Act applies to state reapportionment or redistricting plans, *Thornburg v. Gingles*, 478 U.S. 30, 34, 106 S. Ct. 2752, 2758, 92 L. Ed. 2d 25 (1986), and the Commission concedes that the Final Plan must conform to section 2 as well as the equal protection provisions of the Fourteenth Amendment. We conclude, therefore, that our review of the Final Plan must necessarily consider Voting Rights Act concerns. Our evaluation of the Voting Rights Act issues is, however, strictly circumscribed by the narrow scope of the proceedings, the presumption of good faith and validity we must accord to the Commission,[4] the nature of the evidentiary record **[P. 190]** before us, and our restricted

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[4] We note that the makeup of the Commission was effectively nonpartisan in that neither Democrats nor Republicans commanded a majority of the Commission's eleven members. In addition, the Commission held twenty public hearings across the state and formulated numerous preliminary plans and alternate plans in response to suggestions made by members of the public.

> [I]f neutral decisionmakers developed the plan [to reapportion congressional districts] on the basis of neutral criteria, if there was an adequate opportunity for the presentation and consideration of differing points of view, and if the guidelines used in selecting a plan were explained, a strong presumption of validity should attach to whatever plan such a process produced.

Karcher v. Daggett, 462 U.S. 725, 759, 103 S. Ct. 2653, 2675, 77 L. Ed. 2d 133 (1983) (Stevens, J., concurring).

ability to act as a fact finder when material facts are genuinely disputed.

[6] In accordance with the Supremacy Clause, U.S. Const. art. VI, cl. 2, and our earlier decisions in *In re Reapportionment I* and *In re Reapportionment of the Colorado General Assembly*, 647 P.2d 209 (Colo. 1982) ("*In re Reapportionment II* "), the Final Plan must be consistent with six parameters (in the following hierarchy from the most to the least important): (1) the Fourteenth Amendment Equal Protection Clause and the Fifteenth Amendment; (2) section 2 of the Voting Rights Act; (3) article V, section 46 (equality of population of districts in each house);[5] (4)

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[5] Colo. Const. art. V, Sec. 46 provides:

> Senatorial and representative districts. The state shall be divided into as many senatorial and representative districts as there are members of the senate and house of representatives respectively, each district in each house having a population as nearly equal as may be, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

"The five percent deviation test means that the sum of the percent by which the largest district's population exceeds that of the ideal district and the percent by which the smallest district population falls short of the population of the ideal district must be less than five percent." *In re Reapportionment I*, 647 P.2d at 193 n.4. The population of the ideal district for each house is determined by dividing the population of the state by the number of districts in that house. *Id.* There are thirty-five senators and sixty-five members of the House of Representatives. According to the 1990 federal census, the population of Colorado is about 3,294,400. The ideal senate district therefore contains 94,126

article V, section 47(2) (districts not to cross county lines except to meet section 46 requirements and the number of cities and towns contained in more than one district minimized);[6] (5) article V, section 47(1) (each district to be as compact as possible and to consist of contiguous whole

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persons and the ideal house district is 50,683.

In the Senate, the largest district is District 6 which contains 2.79% more persons than the ideal senate district. Senate District 24 is the smallest with 2.11% less population than the ideal district. The overall deviation is therefore 4.90%.

House District 16 is the most populous with 2.45% more people than the ideal house district. House District 60 is the smallest with 2.51% less persons than the ideal district. The overall deviation for house districts is 4.96%.

[6] Colo. Const. art. V, Sec. 47(2) provides:

> (2) Except when necessary to meet equal population requirements of section 46, no part of one county shall be added to all or part of another county in forming districts. Within counties whose territory is contained in more than one district of the same house, the number of cities and towns whose territory is contained in more than one district of the same house shall be as small as possible. When county, city, or town boundaries are changed, adjustments, if any, in legislative districts shall be as prescribed by law.

general election precincts);[7] and (6) article V, section 47(3) (preservation of communities of interest within a district).[8]

No one has claimed that the Final Plan violates the Fourteenth Amendment Equal Protection Clause or the Fifteenth Amendment. Moreover, we conclude that the Final Plan is consistent with the equality of population requirements of article V, section 46. See footnote 4, above. The first objections to the Final Plan that we consider arise under the federal Voting Rights Act.

II

Section 2 of the Voting Rights Act of 1965

Two distinct groups of objectors have raised claims that the Final Plan violates **[P. 191]** section 2 of the Voting

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[7] Colo. Const. art. V, Sec. 47(1) provides:

> (1) Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall consist of contiguous whole general election precincts. Districts of the same house shall not overlap.

[8] Colo. Const. art. V, Sec. 47(3) provides:

> (3) Consistent with the provisions of this section and section 46 of this article, communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible.

Rights Act of 1965, 42 U.S.C. Sec. 1973 (1988), which provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.*
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision *are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered. *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. Sec. 1973 (emphasis added). The leading case interpreting section 2 after it was amended in 1982 is

Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). *Gingles* involved a vote dilution claim following redistricting and the creation of certain multimember districts in North Carolina. Analysis of a section 2 claim, based on the "totality of circumstances," 42 U.S.C. Sec. 1973(b), is "fact-intensive," *Gingles*, 478 U.S. at 46, 106 S. Ct. at 2764. The Senate Judiciary Committee Majority Report which accompanied the bill amending section 2 contained a nonexclusive list of "typical factors," derived from *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973), which were to be considered in the analysis of a section 2 claim:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (footnotes omitted). Factor two, "the extent to which voting in the elections **[P. 192]** of the state or political subdivision is racially polarized," arose in *Gingles* as the single most important of these factors.

[7][8][9] In *Gingles*, the Court held that a plaintiff must show the following preconditions in order to establish a violation of section 2 in the use of multimember districts:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed, ...--usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51, 106 S. Ct. at 2766. There are several limitations on actions brought under section 2. First, election devices, such as at-large elections, are not per se violations of section 2. Second, the combination of an electoral mechanism and lack of proportional representation does not by itself establish a section 2 claim. Third, the existence of racial bloc voting may not be presumed; the plaintiffs must prove it. *Gingles*, 478 U.S. at 45-46, 106 S. Ct. at 2763-64; *Sanchez v. Bond*, 875 F.2d 1488, 1492 (10th Cir.1989), *cert. denied*, --- U.S. ----, 111 S. Ct. 340, 112 L. Ed. 2d 305 (1990).

[10, 11] One of the key lessons of *Gingles* is that the "ultimate finding of vote dilution" is a question of fact subject to appellate review only under the clearly erroneous standard. *Gingles*, 478 U.S. at 78-79, 106 S. Ct. at 2781. The evidentiary record before us in this original proceeding is sparse. The Commission's resolution of disputed factual issues in the determination of the claims under the Voting

Rights Act was not made in an adversarial proceeding with the accompanying safeguards of cross-examination and a full record and should not be overturned because we would reach a different result. If facts material to the resolution of a section 2 claim are in genuine dispute, if it appears from the record that the Commission has made a good faith effort to resolve these disputed facts, and if the Commission has applied the correct legal standard to the facts it has found, we will not reject the Final Plan on Voting Rights Act grounds.

[12] The first objectors, Blacks for Fair Reapportionment (BFFR), assert that their section 2 claims pertain to House Districts 7 and 8 in Denver. Their proposed plan would incorporate a portion of Adams County and Aurora, a home rule city, into House District 7. It would also shift the common boundary line between House Districts 7 and 8 further to the east. In order to compensate for the loss of population, a small enclave would be carved into Weld County at the northern border of House District 36. These changes would increase the black population in House District 7 from 44.58% (under the Final Plan) to 48.01% (under the objectors' plan), an increase of 3.43 percentage points. Under the objectors' plan, the black population in District 8 would increase from 43.10% to 43.42%, a gain of 0.32 percentage points. These changes are necessary, BFFR alleges, in order to maximize the voting power of blacks and minorities.

The objectors concede that blacks have had success in the past in electing minority candidates in House Districts 7 and 8 over the past approximately fifty years. *Cf. Gingles*, 478 U.S. at 77, 106 S. Ct. at 2780 (per Justice Brennan and one Justice concurring and four Justices concurring in part and concurring in the judgment) (persistent proportional representation in particular multimember district in last six elections demonstrated that the black voting strength in that

district was not impermissibly diluted in violation of section 2). The Commission rejected the opponents' plan because it would require the crossing of county lines and city boundaries contrary to article V, section 47(2). In addition, a reply to the BFFR plan was filed which contends that the BFFR plan itself would violate section 2 because it disenfranchises northwest Aurorans and decreases the opportunity **[P. 193]** for minority Aurora citizens to participate in the political process.

In this court, the Commission first contends that BFFR has not shown that the Final Plan violates section 2 because they have not satisfied the first *Gingles* precondition, that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766. Under BFFR's plan, as under the Final Plan, blacks would remain a minority in House Districts 7 and 8. However, even if this first *Gingles* condition is found not to invariably apply when an objection is made to a single member rather than a multimember district as in *Gingles*, the Commission asserts that the sustained history of black electoral success in Districts 7 and 8 refutes any claim of vote dilution under section 2.

We conclude that resolution of the section 2 claim in favor of the objectors would necessarily involve the finding of material facts that are in genuine dispute. Our examination of the record discloses that the Commission attempted to apply the proper legal standards to the Voting Rights Act claims raised in Districts 7 and 8 and made a good faith effort to comply with section 2 of Act.

The Commission had a report from its own expert that there was very little racial bloc voting in Denver, and that districts in which minorities comprised between forty and

fifty percent of the population had a reasonable opportunity to elect the representatives of their choice. The alternate plan submitted by BFFR would require "two or three" additional county splits. These splits could not be justified under article V, section 47(2) unless section 2 required them. Given the only marginal gains in minority population in Districts 7 and 8 under the BFFR plan, we decline to overturn the Commission's finding that House Districts 7 and 8, as drawn in the Final Plan, comply with section 2 of the Voting Rights Act.

[13] The second objection to the Final Plan based on section 2 was filed by Jennie Sanchez and others and relates to a proposal to redraw the boundaries of House District 60 to include "a large and relatively compact group of Hispanic voters in Southern Colorado, including the San Luis Valley and parts of Pueblo and Las Animas Counties." The objectors contend that it would be possible to redraw District 60 "such that it would have an Hispanic voting-age population of 50+ percent."

In a plan suggested by the objectors, District 60 would contain a majority in the Hispanic voting-age population of 50.03%. The suggested plan, however, ignores natural boundaries and splits seven counties. Under the Final Plan, House District 60 preserves the San Luis Valley intact, includes seven whole counties and splits only one county, Las Animas. The Hispanic population in District 60 under the Final Plan is 45.31% of the total population. The Commission asserts that it drew the boundaries of District 60 with Voting Rights Act considerations always in mind and after paying close attention to the wishes of San Luis Valley residents to preserve the Valley intact.

Moreover, the Commission contends that in order to prevail on their claim under section 2, "the minority group must be able to show that it is politically cohesive."

Gingles, 478 U.S. at 51, 106 S. Ct. at 2766. *Cf. Sanchez v. Bond*, 875 F.2d at 1492-97 (plaintiffs failed to demonstrate political cohesiveness among Hispanics in Saguache County and thus the electoral system used to elect Saguache County Commissioners did not violate section 2). The presence or absence of such political cohesion was hotly contested below at the Commission level and in this court. We conclude that the objectors have not made a showing that would enable us to reject the Commission's determination that District 60 as drawn under the Final Plan complies with section 2 of the Voting Rights Act.

III

Finding that the Final Plan complies with federal law and the equality of population requirement of article V, section 46, we **[P. 194]** now review the plan under article V, section 47. The most important concern under section 47 is whether the Final Plan unnecessarily divides counties or cities within counties. *In re Reapportionment II*, 647 P.2d at 210. Next in importance is "the requirement that each district be as compact in area as possible and the aggregate linear distance of all district boundaries as short as possible, Colo. Const. art. V, Sec. 47(1)." *In re Reapportionment II*, 647 P.2d at 210-11. Also contained within section 47(1) is the mandate that "[e]ach district shall consist of contiguous whole general election districts." Colo. Const. art. V, Sec. 47(1). The least weighty constitutional consideration is the "preservation *wherever possible* of communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, Colo. Const. art. V, Sec. 47(3)." *In re Reapportionment II*, 647 P.2d at 211.

No objection has been raised that the configuration of senate districts in the Final Plan violates article V, section 47(2). Our review of the record reveals no violation of

section 47(2) with respect to the senate districts. A number of objections have been raised, however, that the Final Plan for the house districts unnecessarily splits counties or cities, contrary to section 47(2).

[14] Our examination of the Final Plan as a whole with respect to house districts reveals that, out of the fifty-two counties in Colorado with populations less than that of the ideal house district, six were split.[9] The Commission's justification for each county split was the requirement of equality of population among house districts. The Commission states that Voting Rights Act concerns initially determined the order and manner in which the boundaries were drawn and population was equalized. As we said in *In re Reapportionment I*, 647 P.2d at 197:

> The constitution allows the Commission to divide a county only if necessary to meet the equal population requirement. The Commission's justification for some of the county divisions in the plan before us is not as precise as it might be. Nevertheless, substantial equality of population and avoidance of splitting counties cannot always be met simultaneously. When they cannot, the avoidance of split counties must yield. The area of the state in which these conflicts occur is subject to adjustment, and the Commission must have the discretion to choose where the necessary and constitutionally permissible compromises are made.

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[9] The reapportionment plan for house districts which was ultimately approved by the court in 1982 split seven out of fifty-three counties that were too small to comprise a single district. In re Reapportionment I, 647 P.2d at 195.

As in 1982, we conclude that the Commission complied with the constitutional requirement of article V, section 47(2). Similarly, we determine, with two exceptions, that the Final Plan drawn by the Commission complies with the dictates of article V, section 47(1) and section 47(3).

The one exception is the unnecessary but inadvertent split of the community of Perry Park (population 1,000) in Douglas County into House Districts 20 and 64. The objectors propose first that all of Perry Park be included in House District 20, a configuration which they say will not unduly disturb equality of population. Their second alternative would redraw the line between Districts 20 and 64 so as to include most of the rural area of Douglas County in District 20 and the urban and suburban areas of the county in District 64. At oral argument, counsel for the Commission stated that redrawing the boundaries of Districts 20 and 64 in order to preserve intact the Perry Park community would not be a "hard problem" for the Commission. We, therefore, reject this portion of the Final Plan and return the plan to the Commission to redraw the boundaries of House Districts 20 and 64 to conform with article V, section 47(3).

Pitkin County

[15] The second portion of the Final Plan that we disapprove is the division of Pitkin County and the City of Aspen into **[P. 195]** House Districts 57 and 61. The Pitkin County Board of County Commissioners objects to the division of Pitkin County into two house districts and the resulting division that "the City of Aspen and the economic-related and dependent communities of Aspen and Snowmass Village." The Commission asserts that the Pitkin County splits occurred as a result of the need to obtain the required population level in the districts involved.

District 61 is made up of five counties and two parts of counties, all located in a mountainous area of the state. It includes Lake County, with its county seat in Leadville; Park County, with its county seat in Fairplay; Chaffee County, having Salida as its county seat; and the northern part of Teller County, with Cripple Creek[10] as its county seat. All these counties are on the eastern slope. The balance of District 61 consists of the western slope counties of Gunnison, with its county seat in Gunnison; Hinsdale, with Lake City as its county seat; and part of Pitkin, with Aspen as its county seat. It is the division of Pitkin County between House Districts 57 and 61 that concerns us.

District 61 contains 50,329 residents. Of these, 5,297[11] are from Pitkin County. The remaining 7,364 Pitkin County residents, including a small number of Aspen residents, are placed in District 57, including as well most of Garfield County (county seat in Glenwood Springs), and all of Rio Blanco County (county seat in Meeker) and Moffat County (county seat in Craig). The redistricting boundaries in Pitkin County adversely affect the explicit constitutional criterion of maintaining counties and cities intact. In addition, District 61 lacks compactness. It ranks seventh poorest under both the Schwartzberg test and the Reock test. Visual inspection of the map of District 61 shows that the inclusion of part of Pitkin County as a peninsula jutting out from the mainland of the district contributes to the lack of compactness of the district as a whole.[12] The division of

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[10] Cripple Creek, however, is not in District 61.

[11] The materials submitted do not show the total population of Aspen. It appears likely, however, that the 5,297 persons in District 61 are almost entirely Aspen residents.

[12] This same irregularity in district boundaries adversely affects the compactness of District 57 as well.

Pitkin County can only be defended on the basis that it is necessary to meet the paramount equal population requirement of section 46 of article V.

In addition, the preservation of communities of interest criterion of section 47(3) has been seriously compromised by combining the up-valley, eastern part of Pitkin County with other counties across the continental divide. Although this area of Pitkin County is contiguous to Gunnison County, Lake County, and Chaffee County, reference to any highway map discloses that there is no improved road directly connecting principal population centers in Gunnison County to Pitkin County,[13] and the only access from Aspen to the eastern slope counties is across Independence Pass, which, as the Pitkin County objectors point out, is closed for about six months each year. *See* Colo. Const. art. V, Sec. 47(3).

The Pitkin County objectors also assert a strong community of interest between the residents of the resort City of Aspen and the all but contiguous recreational resort of Snowmass Village, and with other residents of the Roaring Fork Valley, from whom they will be separated by the district boundaries created by the Final Plan. The Commission states that if Pitkin County were not divided, it would be necessary to divide either Summit County or Eagle County in order to achieve substantial equality of population among districts. It does not suggest why such divisions would be equally or less adequate constitutionally than the one adopted.

We conclude that the Commission's explanation for dividing Pitkin County and the City of Aspen, and for the

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[13] A road across McClure Pass connects Redstone, in Pitkin County, with Paonia, in Delta County, and crosses a remote part of Gunnison County.

further division of Snowmass Village from Aspen, does not rise to the level of an adequate **[P. 196]** factual showing that less drastic alternatives could not have satisfied the equal population requirement of the Colorado Constitution. Furthermore, the explanation does not provide a basis for meaningful judicial review of the Commission's decision. We, therefore, disapprove that part of the Final Plan which divides Pitkin County and the City of Aspen into House Districts 57 and 61. We return that part of the plan for reconsideration, revision, modification, and resubmission. If, after considering alternatives, the Commission concludes that the present Final Plan for Districts 57 and 61 is still constitutionally preferable to the alternatives, it may resubmit the present plan. In that case, the Commission should provide the court with additional information detailing the alternatives considered and the reasons for their rejection.

IV

We now discuss the remaining specific objections which have been filed to the Final Plan.

Arapahoe County

[16] A number of objections have been lodged with respect to the boundaries of House District 3. Under the Final Plan, District 3 includes a portion of Denver and then crosses the county line into Arapahoe County. It includes the City of Sheridan and divides the City of Englewood into two House Districts: 3 and 37. The objectors contend that District 3 need not cross the Arapahoe County line in the manner approved by the Commission and that it does so only for political concerns which would allow Denver to keep ten representatives in the House, rather than the nine to which Denver is entitled under the 1990 census.

The Commission points out, however, that even under the Final Plan, Arapahoe County residents comprise a majority in House District 3. Moreover, under both the Final Plan and the alternate Arapahoe County plan, Arapahoe County is split. The objectors have alleged that equal population requirements can be met without dividing cities located in Arapahoe County into more than one house district, but we note that their alternate plan divides at least as many cities within Arapahoe County as does the Final Plan.

The Arapahoe County objectors also assert that the Final Plan does not preserve communities of interest as required under article V, section 47(3). Our examination of the Final Plan and the Arapahoe County alternate plan, however, convinces us that the Commission complied with constitutional requirements when it drew House District 3.

City of Westminster

The City of Westminster has filed a statement of opposition to the Final Plan on a number of grounds. The crux of Westminster's argument is that the City, which lies in both Adams and Jefferson Counties, has been subdivided into seven house districts, contrary to article V, section 47. Westminster also objects to House District 62 which runs from the Jefferson County portion of Westminster through Gilpin, Clear Creek, and Summit Counties.

The Commission explains that it began drawing the boundaries of house districts in the south central portion of the state including the San Luis Valley. The Commission started here primarily out of concern for the Voting Rights Act. It then worked its way west and north, completing districts with whole counties where possible. Summit, Clear Creek, and Gilpin Counties do not have a combined population sufficient for one house district, so the

Commission crossed into Jefferson County, and included the western edge of Westminster in House District 62. The Commission explicitly subordinated concerns arising under article V, section 47 (unnecessary crossing of county lines or splitting of cities, compactness, and preserving communities of interest) to achieve equality of population under article V, section 46.

The Commission also asserts that a number of reasons made it necessary to place Westminster into seven house districts in apparent violation of article V, section 47(2). First, since Westminster's population exceeds that of an ideal house district, **[P. 197]** at least one split was required. Second, since Westminster lies in both Adams and Jefferson Counties, the Commission had to split the City in order to honor the prohibition against unnecessarily crossing county lines. Third, because of concerns under the Voting Rights Act, the Commission initially fixed the boundaries of two districts in the eastern part of Adams County and worked west. Simultaneously, the Commission was moving east out of the mountains in creating District 62. Because of the Commission's choices of where to begin drawing house districts, and in order to bring "closure" to the Final Plan and preserve equality of population, Westminster was split into more parts than if the Commission had proceeded differently.

Placing portions of Westminster into seven house districts is not per se unconstitutional. *See In re Reapportionment I*, 647 P.2d at 197 (court approved 1982 reapportionment plan which split Westminster among seven house districts).

The Commission's explanation of why it was necessary to split Westminster into so many house districts could have been stronger and more detailed. However, we accord the Final Plan a presumption of validity when the Commission

purports to follow the proper constitutional criteria and we will not "substitute our judgment for that of the Commission's unless we are convinced the Commission departed from constitutional criteria." *In re Reapportionment I*, 647 P.2d at 197. Although not absolutely dispositive, we deem it significant that the Westminster objectors have failed to come forward with a concrete alternative plan for house districts in Westminster. Although the question is close, we conclude that the Final Plan for House District 62 and for the City of Westminster does not violate article V, section 47.

Montezuma County

[17] The Bipartisan Committee to Keep Montezuma County Whole asserts that the Final Plan unnecessarily divides Montezuma County into two house districts, contrary to article V, section 47(2), and splits communities of interest, in violation of article V, section 47(3). The alternate plan for rural counties, including Montezuma County, that the objectors have submitted is called the "Shaw/Whole Rural County Plan." Under this plan, which does not address reapportionment in the "Front Range Metropolitan Corridor," the largest deviation in population that is created is 3.73%. The objectors present "mathematical verification" that it would be theoretically possible to reapportion the Front Range districts so that the largest population deviation from the ideal district would be -0.58%, thus preserving the 5% constitutional deviation cap of article V, section 46. As the Commission has pointed out, however, adoption of the Shaw/Whole Rural County Plan would require state-wide reapportionment, an unacceptably large "ripple effect."

Although not dispositive of the objection now before the court, we note that Montezuma was split into two house

districts in the 1982 plan that we ultimately approved. *See In re Reapportionment I*, 647 P.2d at 195. The Commission also states that its Voting Rights Act concerns in drawing the boundaries of District 60 had a "profound influence on the plan for the Western slope," and that once District 60 was fixed a split of Montezuma County was inevitable.

La Plata and Archuleta Counties have a total population of 37,629. The population of Montezuma County is 18,672. These three counties thus have a combined total population of 56,301, approximately ten percent higher than the population of the ideal house district. The Commission contends that if it created a house district comprising La Plata and Montezuma Counties, Archuleta County would have to be combined with Hinsdale and other counties to the north, which would impact the population balances of House Districts 58 and 61. The Montezuma County objectors have not presented an acceptable alternate plan which disproves the Commission's assertions. We find that the Montezuma County split does not offend article V, section 47.

[P. 198]

Baca County

[18] The last specific objection to the Final Plan under article V, section 47(2) is brought by officials of Baca County. They have objected to the Final Plan as it pertains to House Districts 47 and 63. In the Final Plan, House District 47 is comprised of Crowley, Otero, Bent, and Baca Counties, and portions of Las Animas and Pueblo Counties. House District 63 is made up of Elbert, Lincoln, Kiowa, Cheyenne, Kit Carson, Yuma, and Prowers Counties, and the eastern part of Arapahoe County. Thus, three counties are split under the Final Plan.

The alternate plan for District 63 places Baca County with Otero, Bent, Prowers, Kiowa, and Cheyenne Counties and thus splits no counties in that district. The alternate plan fails to demonstrate that the total number of county splits in the state will necessarily be reduced and that the "ripple effects" will not require numerous other changes in the reapportionment scheme. *See In re Reapportionment I*, 647 P.2d at 196 ("It is impossible for us to ascertain in larger counties whether different district configurations might result in a net reduction in the number of house districts which cross county lines."). The Commission explains the districting of eastern Colorado as follows:

> The Commission followed the same basic process in defining [house] districts in eastern Colorado as it did for western Colorado, proceeding east and north from the San Luis Valley and Pueblo area, and completing districts with as many whole counties and as few county splits as possible.

We determine that the Commission complied with article V, section 47, when it placed Baca County in House District 47.

V

Several objectors challenged the Final Plan under article V, section 47(1)'s requirements of compactness and contiguity. This provision is subordinate to section 47(2). *In re Reapportionment II*, 647 P.2d at 210-11. The constitutional compactness requirement "concerns a geographic area whose boundaries are as nearly equidistant as possible from the geographic center of the area being considered, allowing for variances caused by population density and distribution, census enumeration districts, and reasonable variations necessitated by natural boundaries and by county lines." *Acker v. Love*, 178 Colo. 175, 177, 496 P.2d 75, 76 (1972).

We discussed two objective, quantitative tests for compactness in *In re Reapportionment II*:

> One method of measurement involves comparing each district's perimeter to its area. A smaller perimeter/area ratio indicates compactness.... The second method involves measuring the polar moment of inertia of each district. This method quantifies the distribution of the points in a region around its geographic center. A smaller polar moment of inertia indicates a region in which the points are more closely grouped around the region's geographic center and which is thus more compact.

647 P.2d at 212. In determining the degree of compactness within the Final Plan, the Commission used two somewhat different tests: the Reock test and the Schwartzberg test. According to the Commission, in the Reock Test, the computer first determines the two points on the district's boundary that are farthest apart and calculates the area of a circle that would have the line between these two points as its diameter. The polygon area[14] of the district is then divided by the area of that circle to produce a ratio between zero (0) and one (1). The closer the ratio is to one, the more compact the district.

See Ernest C. Reock, Jr., *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J. Pol.

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[14] "Polygon area" is defined by the Commission as "[t]he sum of the areas of all census units (tracts and blocks) assigned to each district. Polygon area is stated in square miles."

Sci. 70 (1961).[15] The second test for compactness [P. 199] the Commission used is the Schwartzberg Test, and the Commission described the test as follows:

Under the Schwartzberg Test, the computer divides the adjusted perimeter of the district (adjusted in accordance with a formula which straightens the boundary by connecting points where three or more units from any district meet) by the perimeter [circumference] of a circle having the same area as the polygon area of the district. The closer the quotient is to one, the more compact the district.

See Joseph E. Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of "Compactness"*, 50 Minn. L. Rev. 443 (1966).[16]

Senate District 24

[19, 20] An objection was filed to Senate District 24 as drawn in the Final Plan on the ground that its configuration violates the compactness and contiguity requirements of section 47(1). As accurately described by the objectors, Senate District 24 consists of two somewhat rectangular areas, plus a "flag pole" waving a small "flag."

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[15] The Reock test has been criticized for "giv[ing] a high rating (near 1) to an arbitrarily misshapen district so long as it meanders around within a confined area." H.P. Young, *Measuring the Compactness of Legislative Districts*, XIII Legis. Stud. Q. 105, 106 (1988).

[16] The Schwartzberg Test also has its critics. "The Schwartzberg measure is defective in that it places too much emphasis on the perimeter and not enough on the overall shape." H.P. Young, *Measuring the Compactness of Legislative Districts*, XIII Legis. Stud. Q. 105, 108 (1988)

We need not delve into the Reock and Schwartzberg factors of the alternative plan submitted by the objectors, however, because the alternate plan splits the populations of Thornton and Westminster and the Final Plan does not. The shape of Senate District 24 was thus determined by the configuration of Thornton. Restrictions against the splitting of cities take precedence over compactness concerns under article V, section 47(1). We also find that Senate District 24 does not violate the requirement of contiguity. The "flag" is included in Senate District 24 because it is a contiguous portion of Thornton, joined with the rest of Thornton by measuring the "pole." Contiguous whole general election districts may, therefore, be drawn in Senate District 24, conforming with the requirement of article V, section 47(1).

Senate Districts 32 and 35

[21] The next objection is made to the boundaries of Senate Districts 32 and 35 in Denver. The Commission states that it "was concerned about compactness as well in Denver, although it recognized that its Voting Rights Act obligations were superior to considerations of compactness. The Commission drew the three minority districts (districts 31, 33 and 34) and then divided the rest of Denver [between] districts 32 and 35 in the most compact way possible."

According to the objectors, their alternate plan, the "1-11 Preliminary Denver Senate Plan," was rejected by the Commission for political reasons at the last minute, and the boundary between Districts 32 and 35 was drawn to avoid placing more than one incumbent senator in a senate district.

[22] *In In re Reapportionment II*, 647 P.2d at 213, we disapproved a portion of the 1982 reapportionment plan because extra-constitutional political considerations had entered into the Commission's deliberations. The districts that we disapproved in 1982 were, therefore, not drawn as

compactly as possible and did not preserve communities of interest wherever possible, contrary to article V, section 47(1) and (3). Political considerations are not per se improper, however. It is only when partisan factors are allowed an importance equal to or greater than the proper constitutional criteria that a plan is defective. As we said in *In re Reapportionment II*:

> While it is not improper for the Commission to attempt to resolve political conflicts engendered by our disapproval of the election sequencing in the original plan, "[p]roblems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster." *Kirkpatrick v. Preisler*, 394 U.S. 526, 533, 89 S. Ct. 1225, 1230, 22 L. Ed. 2d 519 (1969).

[P. 200] *In re Reapportionment II*, 647 P.2d at 213. The objectors assert that "[w]hile the 1-11 is not quite as compact in 32, it is much improved over the Final Plan's 35." Calculations under the Reock and Schwartzberg tests belie the objectors' assertion. The Final Plan's Reock and Schwartzberg factors for District 32 are 0.1951 and 3.2673, respectively. The 1-11 Plan's factors for District 32 are 0.1990 and 3.2909, respectively. *Id.* Thus, District 32 under the Final Plan is somewhat more compact than the 1-11 Plan according to the Schwartzberg Test, and somewhat less compact under the Reock Test.

Under the Final Plan, Senate District 35 is a little more compact measured by the Reock Test (0.4803 as opposed to 0.4708 for the 1-11 Plan), and a little less compact measured by the Schwartzberg Test (2.4324 against 2.3110 for the 1-11 Plan).

The objectors have also submitted a second alternate plan for Districts 32 and 35 called the "Pascoe Plan." The Pascoe Plan's District 32 is slightly more compact than the Commission's District 35 under the Reock and Schwartzberg tests. On the other hand, under the Pascoe Plan, Senate District 32 is less compact under the same tests. Since the results of the objective tests for compactness are inconclusive between the Final Plan and either of the objectors' alternate plans, we determine that the Final Plan does not violate article V, section 47(1).

The objectors also assert that while their Pascoe Plan is similar to the Final Plan with respect to population equalization and compactness, it is superior in preserving communities of interest within Denver. They contend that central Denver is much more aligned with east Denver and parts of southeast Denver than it is with southwest Denver, and that southeast Denver has more in common with the southwest than with central Denver. The Commission has responded that these claims are unsubstantiated and that the geographic distance between southeast and southwest Denver makes the objectors' community of interest claim untenable. Moreover, the Pascoe Plan's Senate District 32, which links southeast and southwest Denver, is less compact than the Final Plan's District 32. We conclude, after a comparison of the overall differences between the two plans, that the Final Plan does not violate article V, section 47(3), which in any event is subordinate to the compactness requirements of article V, section 47(1). Since the proposed Final Plan passes constitutional muster, political considerations that may have been involved in the final determination should not vitiate the plan.

Columbine Knolls South

[23] The final constitutional objection is brought under article V, section 47(3), by the Columbine Knolls South

Homeowner's Association, which consists of 680 families. The homeowners state:

> We are presently in Senate District 22, but under the proposed reapportionment we would be moved into Senate District 13. As part of District 13 we would be included in a district that is primarily mountain and rural. We feel that it would be in the best interest of our community to remain in District 22 as this would best meet the reapportionment criteria "Preservation of communities of interest."

The Commission states that placing the Columbine Knolls South area in District 13 was necessary in order to meet the equality of population requirements of article V, section 46. Since preservation of community interest under article V, section 47(3), must yield to equality of population, we find no constitutional violation in this part of Final Plan.

VI

Requests for Technical Changes to the Plan

[24] Requests for technical changes in the boundaries of the Final Plan were filed by Boulder, Larimer, and Adams Counties. None of the requested modifications are based on the Colorado Constitution or federal law, and are, therefore, outside the scope of this court's review of the Final Plan which is "to measure the present reapportionment plan against the constitutional **[P. 201]** standards." *In re Reapportionment I*, 647 P.2d at 194; see also Colo. Const. art. V, Sec. 48(1)(e).

The Commission views the changes requested changes by Larimer County and Boulder County as minor, technical, and meritorious. We, therefore, conclude that the Commission should incorporate the technical changes requested by Larimer and Boulder Counties into the Final Plan when it resubmits the plan to this court.

VII

Accordingly, we disapprove the Final Plan and return the plan for modification or revision of House Districts 57 and 61 to conform to the requirements set forth in this opinion and for resubmission to the court. In addition, the Perry Park portion of the Final Plan should be corrected and the plan is returned to the Commission to redraw the boundaries of House Districts 20 and 64 to conform with article V, section 47(3). The Commission shall also incorporate the technical changes requested by Larimer and Boulder Counties into the Final Plan when it resubmits the plan to this court.

APPENDIX L

SUMMARY
Alamosa Public Hearing

COLORADO REAPPORTIONMENT COMMISSION SUBCOMMITTEE

Hospitality Room
San Luis Valley Federal Savings
and Loan Building
4th and Edison Avenue
Alamosa, Colorado
November 17, 1981

7:10 p.m.

The public hearing at Alamosa was called to order by Representative Rich Castro, subcommittee chairman with Commissioners Jeannie Jolly and Polly Coleman present. Staff members in attendance were David Morrissey and Deb Godshall.

Representative Castro opened the hearing with a few explanatory remarks about the reapportionment process. He explained that the public hearings are being held to solicit input on the proposed legislative districts. Representative Castro reviewed provisions of the 1974 constitutional amendment, specifically those relating to the commission membership, the constitutional criteria for drawing district lines, and the time frame for the reapportionment process.

Bessie Armstrong. Ms. Armstrong indicated that she would send a written statement to the Commission headquarters in Denver. She did state that she was in favor of Senate District 5 and House District 60 in the preliminary

plan because they would be easy districts to cover for a candidate.

Lee Medina. Mr. Medina felt that there could be legal problems with House District 60. Gunnison County is predominantly Anglo which would have a tremendous impact on the minority voting strength in the rest of the district. Any significant dilution of the minority voting strength in this district could cause legal problems or concern within the minority community, he continued.

Mr. Medina stated that Archuleta County is more connected with the valley than Gunnison County. Ms. Coleman noted that Wolfe CreeK [sic] Pass would be an obstacle between the valley and Archuleta County and questioned the community of interest between the two. Mr. Medina responded that the climate conditions always present a problem in the valley and that Wolfe Creek Pass is no greater obstacle than any other pass.

Phillip M. Lorton, San Luis Valley Commissioners Association. Mr. Lorton said that the county commissioners in the six valley counties find the plan very desirable. Mr. Lorton explained that the valley is an area unto itself, neither west slope nor east slope. The area has never had really good representation because the valley has been split. Mr. Lorton felt that the area needs to be represented as a union because the valley is geographically and economically compatible and has a relatively equal socio-economic situation.

[P. 2]

Gunnison County is the most preferable area to be added to the valley for several reasons, Mr. Lorton opined. Gunnison County has a common border with Saguache County and they have a lot in common. For example, the

mining industry in eastern Gunnison County is an area of common interest with Saguache County.

In response to questions from Representative Castro, Mr. Lorton replied that the valley is more closely tied with Gunnison than with any other county. Wolfe Creek Pass presents transportation problems to Archuleta County and although Cochetopa Pass separates the valley from Gunnison, the Gunnison-Saguache County line is on the other side (north) of the pass. Mr. Lorton explained that Cochetopa Pass will not be plowed at night but that is the only time the road would not be maintained. Because of budget cuts, the Highway Department will not be able to plow at night. Mr. Lorton acknowledged that roads leading out of the valley are often closed for short periods of time during the winter.

Bob Felmlee, Saguache County Republican County Chairman. Mr. Felmlee stated that rural areas are constantly getting what is leftover because of the population growth on the Front Range. He commended the Commission for trying to create a plan which ties together areas with economic and geographical similarities. He agreed with Mr. Lorton's statements regarding the similarities between Gunnison and northern Saguache counties, stating that mining and ranching are common areas of interest. Mr. Felmlee supported both the senatorial and representative districts for the San Luis Valley area.

Keith Edwards, Saguache County Commissioner. Mr. Edwards spoke in support of the proposed commission plan. After listening to alternatives to the plan, Mr. Edwards stated that Saguache County has more in common with Gunnison County than Archuleta County. For example, Mr. Edwards spoke of the Home State Mining Company which is located in Saguache County. However, a great percentage of the employees live in Gunnison County or Salida (Chaffee

County). Saguache also has road exchanges with both Gunnison and Chaffee counties.

Mr. Edwards tried to clear up some of the controversy resulting from his testimony the previous night in Salida. Mr. Edwards stated that the state highway and Cochetopa Pass are open year-round. However, a sign is posted at Cochetopa Pass stating that the pass cannot be plowed at night. Monarch Pass, however, will be maintained at night. Mr. Edwards wasn't sure whether Poncha Pass had a maintenance crew assigned 24 hours per day. However, Poncha Pass does not have the amount of snow and, therefore, is not equipped to handle the amount of snow that areas such as Wolfe Creek Pass and Monarch Pass are equipped to handle.

Responding to questions from Representative Castro, Mr. Edwards said that there is a trade linkage between Gunnison County and the valley. The Home State Mining Company ships to New Mexico via Saguache County Road over the Cochetopa Pass. Mr. Edwards said that approximately 70 percent of the employees of the Home State Mining Company reside in Gunnison County, 22 precept live in Chaffee County and 8 percent live in Saguache County.

Lewis H. Entz, Saguache County Commissioner. Mr. Entz approved of the preliminary Commission plan for House District 60 and Senate District 5.

[P. 3]

Mr. Entz said that it was good to have Costilla County back in the San Luis Valley in a representative district, especially since the San Luis Valley Commissioners Association and the 12th Judicial District include Costilla County. Mr. Entz opined that the valley had quite a bit in common with Gunnison County, and that if Gunnison

County were not in House District 60, Hinsdale County would be isolated. Gunnison County is the transportation corridor to Hinsdale County and Lake City.

Mr. Entz concluded his testimony stating that counties in the San Luis Valley have more contact with Gunnison County than with Huerfano County, and that he was glad to see Archuleta County back on the west slope where it belonged.

Raymond B. Roybal. Mr. Roybal spoke in opposition to House District 60 in the preliminary plan. Mr. Roybal commended the Commission for bringing Costilla County back into the San Luis Valley. However, the representative from House District 60 would have to go through another house district to reach Gunnison County due to geographical barriers. If Archuleta County were placed in District 60 instead of Gunnison County, the minority vote would be maximized. Also, Chaffee County could be added to the valley district since US 50 connects the northern valley with Chaffee County and Poncha Pass is maintained 24 hours per day. Mr. Roybal emphasized the ethnic ties between Chaffee County and the valley.

Ms. Coleman commented that she could see no community of interest between the valley and Archuleta County. Mr. Roybal contended that the Hispanics in Archuleta County have cultural ties with the San Luis Valley. In addition, the Hispanic community in the Salida area in Chaffee County also has cultural ties with the valley. However, southern Gunnison County has no such cultural ties.

Responding to Representative Castro's question, Mr. Roybal stated that there are current economic ties between Archuleta County and the valley, such as the Wolfe Creek ski area.

Dennis Vigil, Del Norte. Mr. Vigil was pleased that Costilla County was brought back into a district with the San Luis Valley. However, he opposed the Commission plan because the inclusion of Gunnison and Hinsdale counties in a district with the San Luis Valley would disperse and dilute the opportunity for the Hispanics to be represented.

Also, from the Hispanic viewpoint, there is little communication between Gunnison County and the valley. Mr. Vigil commented that he does no shopping in Gunnison County, has no communication with that county, nor does he receive any of his medical benefits in that county. Mr. Vigil suggested that, instead of Gunnison County, Archuleta and southern Chaffee counties could be added to House District 60, thus preserving the cultural ties of the Hispanic community.

Donna Velasquez, Del Norte. Ms. Velasquez opposed the commission's preliminary plan. She stated that, as a housewife, she does her trading in the Alamosa - Monte Vista area. She could not see Gunnison as a trade area because of distance. Ms. Velasquez preferred that Archuleta or Chaffee counties be included in House District 60.

[P. 4]

Arlene Burkhart, Rio Grande County Democratic Central Committee and Monte Vista Chamber of Commerce Governmental Affairs Committee. Ms. Burkhart said that she was very happy that Costilla County was included in the valley district and would oppose any suggestion to remove Costilla from the valley district. Ms. Burkhart recognized that the valley isn't large enough for one representative district. However, for traveling convenience, she asked the commission to draw a representative district that would include only one pass. If Archuleta and Chaffee counties were included in House District 60, a legislator would have

to cross two passes. Ms. Burkhart suggested that Huerfano County be added to the valley instead of Gunnison so that no counties would be split.

Ms. Burkhart acknowledged that there is little trade from the valley to surrounding counties. Probably the most trade occurs between northern Saguache and Gunnison counties. In addition, the Wolfe Creek ski area is a joint effort between the valley and Archuleta County.

Ms. Coleman noted that Saguache County residents pay school taxes to a Gunnison County school district. She asked Ms. Buckhart if she felt that the school taxes, the mine, and the fact that part of Saguache County lies over Cochetopa Pass would overshadow the fact that people go from Saguache through Salida to go to Denver. Ms. Burkhart responded that the situation in that portion of Saguache was already awkward and she could not see how it would be made any more awkward not being in a legislative district with Gunnison.

Evan Valdez, Costilla County Democratic Central Committee. Mr. Valdez commended the Commission for placing Costilla County in the San Luis Valley. Mr. Valdez -stated that Costilla County has social, economic and political ties with the valley. However, he suggested that Chaffee County be included with the valley because Poncha Pass is always open. Mr. Valdez's past experiences have shown that Cochetopa Pass is frequently closed.

Don Eden, Alamosa Democratic Committeeman from Precinct 11. As an employee of Adams State College, Mr. Eden said he would prefer that the San Luis Valley had three representatives and two senators to lobby for the colleges. Since this was not possible, Mr. Eden reluctantly endorsed the Commission plan. He stated that the proposed plan would provide the valley with a resident representative. In

addition, the valley newspaper and radio station provide a communication network throughout the valley. Mr. Eden stated that the valley counties are linked economically by agriculture, ranching and mining. In conclusion, he said the valley needs water and industry and he hoped that the representative would help.

Rick Sanchez, Vice Chairman Alamosa County Democratic Party. Mr. Sanchez was pleased that the valley was reunited with the inclusion of Costilla County in House District 60. He stated that there is a significant amount of trade between Costilla and Alamosa counties. However, there is little trade between Gunnison and the valley. Mr. Sanchez proposed that Archuleta and part of Chaffee County be added to the valley district instead of Gunnison County. Trade exists between Archuleta and the valley because of the Wolfe Creek ski area. Adams State College offers credits for skiing in that area.

[p. 5]

Rex M. Shepperd, Creede Town Board. Mr. Sheppard noted that the Wolfe Creek ski area is in Mineral County and that a part of Mineral County is on the other side of the pass.

Mr. Shepperd opined that the San Luis Valley is a geographically isolated area which is more connected to Albuquerque than to any other Colorado counties. Including Chaffee County in the San Luis Valley district makes the best sense as Poncha Pass is the easiest pass to cross. From the Mineral County point of view, Archuleta would be the ideal county to include in District 60. However, he continued, if the main criteria is to keep counties whole, then Huerfano County could be added to the valley for political and ethnic balance.

Mr. Shepperd concluded his testimony stating that he was interested in putting together an apolitical unit which would represent the interests of the San Luis Valley.

Alex Marquez, Costilla County Reapportionment Committee. Mr. Marquez commended the placement of Costilla County in the valley district but opposed putting Gunnison in House District 60. He believed that transportation over passes does not create a problem because of the sophistication of snow removal machinery.

Mr. Marquez said that the ethnic makeup of the district would be better if Archuleta and Chaffee counties were in House District 60 instead of Gunnison County. There are 15,000 Hispanics living in the six county San Luis Valley which would be greatly diluted if Gunnison County were in the district. Additionally, most of the valley trade is with Archuleta and Chaffee counties. There are 14 school districts in the valley which transport students to Archuleta and Chaffee counties.

Juan Gomez. As a property owner in Archuleta and Saguache counties, Mr. Gomez cited his personal experiences as evidence for putting Archuleta County in House District 60. Mr. Gomez said that he never meets people from Gunnison County whereas he sees at least one person a month trading from Archuleta County in the hay, feed, wool and livestock business. Also, Wolfe Creek is a common ski area between Archuleta and the valley. Mr. Gomez said that Archuleta and valley schools compete in athletic events. Concluding his testimony, Mr. Gomez reiterated that it makes more sense to include Archuleta County rather then Gunnison in the valley district.

Patricio Gonzales. Mr. Gonzales said that he would-like to see the valley kept intact and, to make up the necessary

population, he would prefer that Archuleta and part of Chaffee counties be included in the valley district.

Daisy Ortega. Ms. Ortega stated that she was opposed to the preliminairy [sic] plan. She explained that mining is the primary occupation in both Huerfano and Gunnison counties, whereas agriculture is the economic base in the San Luis Valley. If a mining area were placed with an agricultural area, competition for water would result. She felt that any area which would compete for water should not be placed in the valley district.

[P. 6]

Manuel Solano, Mexican American Legal Defense and Education Fund (MALDEF). Mr. Solano said that from the testimony presented at the hearing and because of access difficulties, Gunnison County should be disassociated from the San Luis Valley. He continued his testimony by explaining that one-third of the population of Archuleta County is Hispanic and there is a great percentage of Hispanics in Chaffee County. Therefore, the community of interest and economic exchange criteria would dictate that Archuleta and part of Chaffee counties be included in the valley district.

In response to a question from Ms. Coleman, Mr. Solano said that he was not a resident of the area but he was the regional director of MALDEF and represented the Hispanic population in the area.

Quentin Garcia. Mr. Garcia said that he was glad to see Costilla County back in the San Luis Valley. However, he felt that he had nothing in common with Gunnison County residents and transportation to Gunnison was a problem. Therefore, Archuleta or Chaffee counties should be placed in House District 60.

Ms. Jolly pointed out that in previous testimony Gunnison residents suggested an alternative whereby all of Gunnison County would be placed in the valley and Costilla County would be placed in a district with Huerfano. However, as the plan now stands Costilla County is in the San Luis Valley district.

Salso Lopez. Mr. Lopez believed that energy considerations should be the most important criteria in drawing district lines. The issue of water is critical for the future of the valley and therefore, the valley should have its own representative to protect its water interest. Also, neither Gunnison nor Huerfano should be included with the valley because the mining industry would compete for water needed for agriculture in the valley. Joining Archuleta County to the valley would be of economic benefit to the valley because Archuleta is developing natural gas. Communities that are restricted by geographical barriers need energy assistance and Archuleta County could provide that assistance for the valley, Mr. Lopez concluded.

Ms. Jolly explained to Mr. Lopez that the constitution allows for a 5 percent deviation from the lowest to highest districts, making it impossible for the San Luis Valley to have its own district. The valley counties have a population of 38,322, far below the minimum allowable limit.

Written statements submitted to the Commission are attached.

8:47 p.m.

Meeting adjourned.

APPENDIX M

SUPREME COURT, STATE OF COLORADO

Case No. 92 SA 19
Original Proceeding Pursuant to the Rules
Regarding Reapportionment

IN RE REAPPORTIONMENT OF THE COLORADO GENERAL ASSEMBLY

RESPONSE OF COLORADO REAPPORTIONMENT COMMISSION TO OBJECTIONS TO FINAL PLAN

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* * *

[P. 13]

C. House District 60 (San Luis Valley)

The Final Plan for House District 60 preserves the San Luis Valley intact, includes seven whole counties,[9] and splits one county.[10] The plan creates a district in which total Hispanic population is 45.31% of total population (*see* Final Plan at House Report 28), an improvement of over 5%

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[9] Saguache, Mineral, Rio Grande, Alamosa, Conejos, Costilla, and Huerfano Counties.

[10] Las Animas.

from the present districting scheme.[11] Voting age Hispanics in District 60 in the Final Plan constitute 42.38% of the voting age population. Affidavit of Rebecca C. Lennahan, ¶ 6 (attached as Exhibit 18 hereto). The proposed district is supported by the San Luis Valley Hispanic League, the statewide Hispanic League, and the Colorado Hispanic Bar **[p. 14]** Association. (The last two organizations have filed statements in support of the Final Plan.)

In opposition to this proposal, the San Luis Valley objectors have suggested a plan that produces a bare majority of Hispanic voting-age population, 50.03%.[12] But, to obtain this 7.65% increase in Hispanic voting age population over the Final Plan, the objectors ignore natural boundaries, group together voters from diverse geographic regions of the state (the San Luis Valley and Eastern Slope regions), and split every county they touch.[13] The objectors simply sat down at a computer and drew the boundaries of their proposed district in whatever manner was necessary to obtain

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[11] Total Hispanic population in the present San Luis Valley district is 40.20%. *See* Election Data Services Report at 8 (Sept. 12, 1991) (included in Exhibit 7 to Commission's Legal Memorandum).

[12] The Commission is informed and believes that the objectors formulated their plan because of a misperception regarding the impact of the Final Plan on Hispanic voting strength in the San Luis Valley. Apparently, the objectors were under the mistaken belief that the Final Plan for District 60 produced a Hispanic voting age population of 29.8%, rather than the 42.38% voting age population actually created by the plan.

[13] The San Luis Valley objectors' plan splits ConeJos, Rio Grande, Saguache, Alamosa, Costilla, Las Animas and Puebio Counties.

a slight preponderance of Hispanic voters.[14] Nothing in the Voting Rights Act, however, mandates adoption of this tortured district.

As noted above, the Final Plan must be accorded a strong presumption of validity. To overcome this presumption, the objectors must clearly establish a *prima facie* Voting **[P. 15]** Rights Act case. *Castay v. St. John the Baptist Parish Police Jury*, 485 F. Supp. at 240; *Dameron v. Tangipahoa Parish Police Jury*, 336 F. Supp. at 920. Although the San Luis Valley objectors have alleged a *prima facie* case, an examination of the entire record developed before the Commission demonstrates that they cannot establish *any* of the elements of a *prima facie* claim.

1. Geographic compactness

The objectors recognize that to prevail they must first demonstrate the ~existence of a minority group that is sufficiently large and geographically compact to constitute a majority in a single member district.. Sanchez Opposition at 3 (citing *Gingles*, 478 U.S. at 50). The objectors interpret this factor as merely requiring that the drawing of such a district be "feasible." *Id.* at 4. They also point to some unusual voting district configurations that have been judicially approved. *Id.* at 4-3 (citing *Hastert v. State Bd. Of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991)). The objectors assert, in short, that the first *Gingles* factor merely requires that someone draw a figure on a map which results in a district with a majority Hispanic population. The first step in the *Gingles* analysis, however, is not so elementary.

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[14] The objectors admit as much in their brief. Footnote 4 states that the proposed plan "should not be viewed by the Court as the only feasible plan" that could be drawn. Sanchez Opposition at 2 n.4.

Gingles requires that a proposed district be "geographically compact." 478 U.S. at 50. While this **[P. 16]** requirement must be given a "'practical' or 'functional'" meaning (*Dillard v. Baldwin County Board of Education*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988)), compactness may not be entirely disregarded in the single-minded pursuit of a minority majority. A district is geographically compact only "if it allows for effective representation." *Id.* As the *Dillard* court explained:

> a district would not be sufficiently compact if it was so spread out that there was no sense of community, that is, if its members and its representative could not effectively and efficiently stay in touch with each other; or if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived within the district

686 F. Supp. at 1466. Other courts have articulated the same analysis. *E.g.*, *East Jefferson Coalition v. Jefferson Parish*, 691 F. Supp. 991, 1007 (E.D. La. 1988) ("A proposed district is sufficiently compact if it retains a natural sense of community"). The convoluted, meandering district proposed by the objectors fails this test

The Commission heard extensive presentations at a public hearing conducted on November 18, 1991 in Alamosa regarding a proposal that (while not as drastic as the objectors' plan) would have split the San Luis Valley in order to increase the percentage of Hispanic voters. A summary of the presentations received that night is included as Exhibit 17 of the Commission's Legal Memorandum. A transcript **[P. 17]** of the testimony is attached as Exhibit 19

hereto.[15] That testimony, which included statements from representatives of San Luis Valley Hispanic groups and Hispanic leaders, was overwhelmingly in favor of preserving the San Luis Valley intact.

The statements in Alamosa emphasized the unique geography of the Valley which makes it a "natural" community.[16] The testimony also stressed the differences

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[15] The transcript was prepared from audio tapes of the public meeting.

[16] Avelino Muniz, a representative of the San Luis Valley County Commissioners Association and a Conejos County Commissioner, presented the Commission with a resolution emphasizing the unique geography of the region. (The resolution is Attachment B to the Summary of the November 18, 1991 Public Hearing (attached as Exhibit 17 to Commission's Legal Memorandum). That resolution asserts that the San Luis Valley "has very little in common with communities around it" and that it must be entered by one of "5 major high mountain passes." It also emphasizes that "the uniqueness of this valley must be represented by only one Senator or one representative for the benefit of the people of the Valley." Other speakers emphasized that the geography increased the natural sense of community within the Valley. *E.g.*, Transcript of November 18, 1991 Hearing at 17 (Statement of Vern Rominger, Rio Grande County Commissioner) ("Well, let me just quickly here mention a few things that are so common to all of us here in the Valley. Everything is called San Luis Valley. We have San Luis Valley Cattlemen's Association, San Luis Valley Water Conservancy District [and going on to list numerous other entities]"); *Id.* at 36 (Statement of John Stump, Director of the San Luis Valley Development and Planning Commission) ("This is an identifiable area, you can go almost anywhere in the State and say 'San Luis Valley' and people know what you are talking about. Anything that would destroy that identity would also destroy many, many years of hard work and planning and a lot of work by many government agencies . . . .

between the interests of residents inside and outside the [P. 18] Valley.[17] The difficulty of traveling into and out of the Valley was noted.[18] Finally, a recurrent theme was the

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[P]ractically every branch of government, federal and state, recognizes the Valley as a separate geographic entity unto itself").

[17] *See* Transcript of November 18 , 1991 Hearing at 22 (Statement of Vickie Ford) ("It is essential for citizens of the San Luis Valley to have representation that understands ranching and farming issues, water issues, and issues important to our fine regional college and interest unique to this Valley. To ask a representative from the other side of the mountains, any side of the mountains, to keep Valley concerns first and foremost is almost too much"); *id.* at 38 (Statement of Manuel Lopez, San Luis Valley Hispanic League) ("[T]here [are] common issues to the Valley, they benefit everybody in the Valley, whether you're Asian, Chicano, Hispanic, Anglo, Italian, whatever the ethnic or racial breakdown, we have commonality on a lot of issues, and I think that's what we came down on. Our representatives represent us on those issues . . . we have a lot of differences on certain issues which we discuss with them and we have commonality on a lot of issues which we do not feel people from the other side of the hill will represent us on"); *id.* at 42 (Statement of Ray Wright, Colorado Water Conservation Board) ("It's very easy to see that the people of the Valley are very protective and parochial about their representatives. We don't require that our representatives know a little bit about water . . . we require them to be experts. The water in the west is under attack from a lot of directions. . . . The people of the San Luis Valley don't want their representation coming from the East Slope").

[18] Transcript of November 18, 1991 Hearing at 13 (Statement of Avelino Muniz, ConeJos County Commissioner) ("if you didn't come by plane, you would have had to come over five high mountain passes which today would have been very difficult to come over"); *id.* at 23 (Statement of Vicki Ford) ("How long would it take me or any other Saguache County resident to drive

pronounced preference of residents within the Valley to be kept together and *not* included in voting districts outside their geographic area. *See* Summary of November 18, 1991 Public Hearing (attached as Exhibit 17 to the Commission's Legal Memorandum) (demonstrating that virtually every speaker, **[P. 19]** including representatives from Hispanic groups, favored retaining the San Luis Valley intact).

Taken together, the above evidence suggests that there would be "no sense of community". in the plan proposed by the San Luis Valley objectors. *Dillard*, 686 F. Supp. at 1466. The objectors' proposal is vastly different from the admittedly unusual district approved in *Hastert*. Although that plan was not "compact", in the usual sense and joined two distinct population centers, the "two separate Hispanic population clusters [were] less than a mile from each other at their closest points." *Hastert*, 777 F. Supp. at 649. By contrast, the disjointed district proposed by the objectors rambles through (and splits) seven counties and joins regions of the State that have diverse political interests.[19] This makes it highly unlikely that the members and representative of the proposed district could "effectively and efficiently stay in touch with each other." *Id.* The plan, in short, fails the

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to a meeting on the other side of the mountains . . . . If I wish to see or talk to Senator Pastore, our representative now, I can make a local phone call, or I can drive a reasonable distance . . . . If my senator or representative lived over the hill, I might drive over a pass, just might, depending on the weather, or make a long distance phone call to visit with them. And then I can only hope that they understood the issues important to valley residents").

[19] *E.g.*, Transcript of November 18, 1991 Hearing at 42 (Statement of Ray Wright, Colorado Water Conservation Board) (discussing water interests of San Luis Valley residents and concluding that "[t]he people of the San Luis Valley don't want their representation coming from the East Slope").

first *Gingles* factor because it would not "retain[] a natural sense of community." *East Jefferson Coalition*, 691 F. Supp. at 1007 (rejecting a proposed redistricting plan **[P. 20]** because it was convoluted and drawn simply to increase minority voting strength).

2. Political cohesion

The second *Gingles* factor requires the objectors to show that the minority group within its proposed district is "politically cohesive." *Gingles*, 478 U.S. at 51. The only evidence of political cohesion cited by the objectors is an Election Data Services report which concluded that "Hispanics are politically cohesive in the San Luis Valley." Report of Election Data Services at 1 (Oct. 14, 1991) (attached as Exhibit 7 to Commission's Legal Memorandum). But, while this report demonstrates cohesion *within the San Luis Valley* (a fact that the Commission does not dispute), it provides *no* evidence that there is Hispanic cohesion within the rambling and geographically divergent district proposed by the objectors. The Commission, in fact, received overwhelming evidence (much of it coming from representatives of Hispanic groups) that Hispanics within the San Luis Valley *would not* be politically cohesive with Hispanic. outside the Valley.

Testimony before the Commission by representatives of the San Luis Valley Hispanic League emphasized that Hispanics within the Valley had diverse interests from other voters (including other Hispanics) outside the Valley.[20]

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[20] *E.g.*, Transcript of November 18, 1991 Hearing at 11 (Statement of Pete Gomez, San Luis Valley Hispanic League) ("the San Luis Valley Hispanic League strongly opposes any attempts to mine water and transport it out of the San Luis Valley . . . [and] the San Luis Valley Hispanic League

Speakers **[P. 21]** (including Hispanic citizens) stressed they had little in common with citizens outside the Valley.[21] Moreover, a Hispanic who was active in voter registration efforts argued that drawing districts to include voters outside the San Luis Valley might actually lower the Hispanic vote because Hispanics within the Valley would feel their interests would not be represented.[22] This same speaker suggested that there was no need to split the Valley to obtain additional Hispanic voters because, over the next few years, many young Hispanic residents within the Valley would reach voting age, thereby naturally increasing the electoral influence of the minority.[23] The evidence before the Commission, in short, **[P. 22]** demonstrated that San Luis

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endorses and supports [keeping the Valley intact]).

[21] *E.g.*, Transcript of November 18 1991 Hearing at 38 (Statement of Manuel Lopez San Luis Valley Hispanic League) ("[W]e do not feel people from the other side of the hill will represent us . . . . [W]e feel we need representation that understands Valley issues").

[22] Transcript of November 18 1991 Hearing at 34 (Statement of Dennis Lopez) ("I think that by splitting up the Valley again . . . the Hispanic voters in this Valley would think that their chances of having a local representative that would represent their interests would be minimized and therefore by keeping the Valley as a whole and maximizing that Hispanic vote would encourage people that yes they do have an opportunity they will have a voice and therefore will probably more apt to register").

[23] Transcript of November 18 1991 Hearing at 35 (Statement of Dennis Lopez) ("[I]n preparing for that voter registration drive we looked at those figures and the figures indicated that the numbers are there, the Hispanic population in the valley as you well know across the state also is a very young population. . . . And therefore there will ba more people eligible to vote within the next ten years").

Valley Hispanic were "arguing for their community . . . arguing for their valley." Transcript of November 18 Hearing at 43 (Statement of Mike Lister, Monte Vista City Council, and member of San Luis Valley Hispanic League).[24]

In light of the foregoing, there is no evidence presented that the minority district the objectors have drawn is politically cohesive. There is substantial, in fact overwhelming, evidence that Hispanics *within* the San Luis Valley are politically cohesive. However, there is no sound basis for reaching the same conclusion regarding a district that divides and goes outside the Valley.

In fact, the alternative plan advocated by the objectors involves greater population residing outside the Valley (26,1[illegible] than in the Valley (24,980). If Hispanics outside and within the Valley are not politically cohesive, the district drawn by the objectors will not help Hispanics in the Valley.

[P. 23]

The objectors have pointed to nothing that overcomes the strong presumption of validity that must be accorded the

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[24] *See also* Transcript of November 18, 1991 Hearing at 45 (Statement of Phillip Archuleta) ("I am also a fifth generation Hispanic. . . . I have been involved in various campaigns. I haven't run for any political offices myself but, from a personal perspective, I appreciate the priority of keeping the Valley together. This is home. It has always been home, and I certainly do not see the need to look for people across the mountain for help in meeting many of our needs"); *id.* at 47 (Statement of Juan Gomez) ("[I]n my retail business I probably encounter some 100, 125 people on a daily basis . . . . [W]ith the exception of the two people that I heard speak earlier from Saguache County . . . I have not heard anybody say that they support . . . splitting the valley").

Commission's decision to draw District 60 so as to keep the San Luis Valley intact. And, without such a showing, this Court must conclude that the second *Gingles* factor has not been established.

3. Bloc voting

The third, and final, element of a *prima facie* Voting Rights Act claim is proof of racial bloc voting. *Gingles*, 478 U.S. at 51. The Commission recognizes that Election Data Services concluded that there was evidence of racial bloc voting within the San Luis Valley. *See* Report of Election Data Services at 6 (Sept. 12, 1991); *id.* at 2 (Oct. 14, 1991). Several of the witnesses at the November 18 public hearing, moreover, asserted that voting in the Valley had been racially polarized. *See generally* Summary of November 18, 1991 Hearing.[25] But, notwithstanding the foregoing, there is no firm basis in this record for concluding that such bloc voting, to the extent it may exist, would prevent Hispanics from electing a candidate of their choice in District 60.

[P. 24]

For one thing, the Election Data Services report was based on exceedingly limited data. The report only analyzed countywide elections in the 1988 and 1990 general elections, and even then not all the counties in the Valley were

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[25] The majority of Hispanic witnesses who commented on racial bloc voting nevertheless argued that the Valley should not be split to increase Hispanic voting strength. E.g., Transcript of November 18 Hearing at 11 (Statement of Pete Gomez, San Luis Valley Hispanic League); *id.* at 33 (Statement of Dennis Lopez); *id.* at 38 (Statement of Manuel Lopez); *id.* at 45 (Statement of Phillip Archuleta). Some individuals asserted that there was no bloc voting in San Luis Valley. *Id.* at 47 (Statement of Juan Gomez); *id.* at 52 (Statement of Maria Trujillo Schmitz).

examined, since elections involving Hispanic and Anglo candidates had not occurred in those counties. *See* Report of Election Data Services at 2 (Oct. 14, 1991). The report, moreover, concluded that over 20% of white voters would "cross over" to vote for Hispanic-preferred candidates. *Id.* Hispanics, furthermore, have enjoyed relatively significant electoral success in local elections. Testimony before the Commission indicated that Hispanics had been elected to seven of eighteen County Commission seats, while four of six counties within the Valley had elected Hispanic sheriffs. Transcript of November 18 Hearing at 27 (statement of Keith Edwards, Saguache County Commissioner). These facts undermine any categorical assertion about the effects of racial bloc voting.

In addition, the United States District Court for the District of Colorado, in a decision affirmed by the Tenth Circuit Court of Appeals, has concluded that racial bloc voting *does not* exist in Saguache County (one of the counties within proposed District 60). *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 340 (1990). While this decision, of course, would not preclude this Court from **[P. 25]** reaching a contrary conclusion regarding the Valley as a whole, the objectors would have to make a very convincing showing before the Court could reach a result in opposition to *Sanchez*.

As a result of the foregoing, it is at least debatable whether racial bloc voting actually occurs in the San Luis Valley and whether such voting would operate to defeat the minority-preferred candidate in District 60. Because that point is debatable, the objectors have not overcome the presumption of validity that attaches to the Final Plan. The Court, therefore, should find that the third *Gingles* factor has not been met.

The outcome of the above analysis is that the San Luis Valley objectors have not established any of the three essential preconditions to a Section 2 Voting Rights Act claim. In the absence of a *prima facie* violation of federal law, this Court should approve the Final Plan. The Commission was sensitive to the needs of Hispanic voters: Hispanic population is improved from 40.20% total population in the current district to 45.31%. More importantly, the total Hispanic voting age population is increased to 42.38%. This voting age population, when combined with the 20% white crossover vote found by Election Data Services, is sufficient to . . . .

APPENDIX N

SUPREME COURT, STATE OF COLORADO

Case No. 92 SA 19
Original Proceeding Pursuant to the Rules
Regarding Reapportionment

IN RE REAPPORTIONMENT OF THE COLORADO GENERAL ASSEMBLY

LEGAL MEMORANDUM AND EXPLANATORY MATERIALS IN SUPPORT OF FINAL PLAN FOR DISTRICTS IN THE SENATE AND HOUSE OF REPRESENTATIVES

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* * *

[P. 26]

e. South Central Colorado (House Maps 1, 19, 21)

District 60 includes all of the six counties that constitute the San Luis Valley: Saguache, Mineral, Rio Grande, Alamosa, Conejos, and Costilla. To satisfy the population requirement and complete the district, the Commission chose to go east in order to avoid the dilution of Hispanic population that would occur by going other directions. All of Huerfano County and part of Las Animas County were included as a result. The district stops on the western boundary of Trinidad, thus avoiding a city split. The Final Plan involves only one county split (Las Animas), rather than the three county splits that were in the preliminary plan.

Districts 45 and 46 (see House Map 21) cover most of the city of Pueblo. District 46 was drawn in a manner

designed to [P. 27] improve the opportunity of the Hispanic community to elect a representative of its choice. The district includes 46.84% Hispanics, up from 43.96% under the 1981 plan.

District 44 (see House Map 21) began with the remainder of Pueblo County and includes all of Custer and Fremont Counties and the southern half of Teller County.

f. Western Colorado (House Maps 1, 8, 13-15, 20, 22)

Once the Commission had fixed the boundaries of the districts in the San Luis Valley and Pueblo area, which had special Voting Rights Act concerns, it employed a relatively straightforward process thereafter in defining districts in western Colorado. In general terms, the Commission worked its way west and north, including as many whole counties and splitting as few counties as possible to reach the required population level, all with due consideration of preserving communities of interest wherever possible. Splits of Teller County (see House Map 22), Montezuma County (see House Map 20), Delta County (see House Map 8), Garfield County (see House Map 13) and Pitkin County (see House Maps 13, 14) occurred as a result of the need to complete the required population level of the districts involved. Hinsdale County was included in district 61 (see House Map 1) because testimony at a public hearing indicated that Hinsdale County

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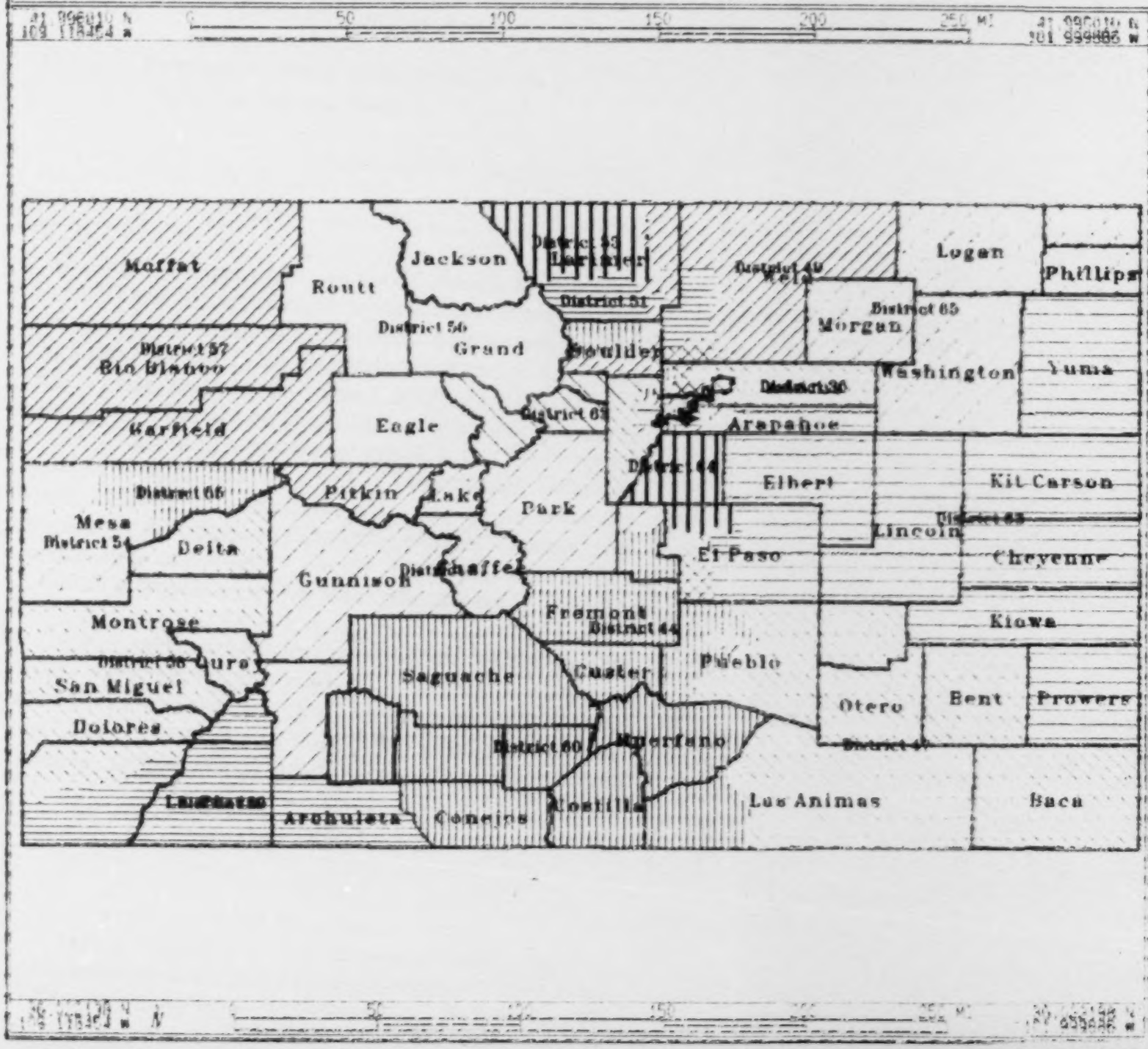
APPENDIX O

Colorado Legislative Council

Final Plan – House of Representatives

November 30, 1993



LEGEND

- County Boundary
- District 1
- District 2
- District 3
- District 4
- District 5
- District 6
- District 7
- District 8
- District 9
- District 10
- District 11
- District 12
- District 13
- District 14
- District 15
- District 16
- District 17
- District 18
- District 19
- District 20
- District 21
- District 22
- District 23
- District 24
- District 25
- District 26
- District 27
- District 28
- District 29

Colorado Legislative Council
029 State Capitol Bldg
Denver, CO 80203

ATTACHMENT A

APPENDIX P

Executive Summary

Prepared on behalf of the Office of the
Attorney General, State of Colorado

by

Jeffrey S. Zax, Ph.D.

[P. 1]
I have been retained by the State of Colorado to conduct a statistical analysis of voting behavior in State House District 60 and respond to plaintiffs' statistical analysis prepared by Dr. Robert Bardwell. Dr. Bardwell has presented the Court with a naive analysis that focuses solely on ethnicity as a determinant of voting behavior. This analysis ignores, and is contrary to, the vast amount of research that finds voting behavior is determined by a host of other factors, including party affiliation, incumbency and socio-economic characteristics. Further, partisan-polarized voting can account, just as effectively, for the results generated by Dr. Bardwell's simplistic two-variable methodology.[1]

To properly account for these various determinants of voting behavior, I performed a multivariate statistical analysis that appropriately apportions responsibility for vote outcomes in State House District 60 among all of their possible determinants, including the ethnicity of both

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[1] See my "Response to 'The Analysis of Racially Polarized Voting Including State House Primary and Additional State House 60 Elections' by Robert A. Bardwell, Ph.D.", 25 February 1993

precinct voting-age populations and candidates.[2] My analysis clearly demonstrates that neither Hispanic nor non-Hispanic voters cast their votes solely, or even primarily, on the basis of candidate ethnicity. Voting behavior varies, for example, according to the socio-economic and demographic characteristics of various precincts.

Indeed, this analysis demonstrates that candidate political affiliation is the single most important factor that distinguishes between the vote outcomes in precincts that are heavily Hispanics and heavily Anglo in House District 60.[3] The role of ethnicity, on the other hand, [P. 2] is relatively minor. In fact, in the 1990 State House District 60 election, more heavily Hispanic precincts voted more heavily for Anglo Democratic candidates than for Hispanic Democratic candidates.

Dr. Bardwell attempts to discount the role of political affiliation by reviewing Democratic primaries. This effort assumes that voting patterns in primaries are good indicators of how voters vote in general elections. There are many reasons to believe that such an assumption is incorrect. For example, the turnout rate in primaries is far below that in general elections. My analysis of election results establishes that the small number of voters that turnout for primaries do not reflect the much larger group of voters that turnout for the general election.[4] This larger group includes, of course,

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[2] This analysis is contained in my report "Determinants of Voting Behavior in Colorado State House District 60", 6 December 1993.

[3] Exhibits 2(a-e) of my report of 6 December 1993 summarize these results.

[4] See pages 5-6 of my report of 25 February 1994.

Hispanic and non-Hispanic voters who register as Republicans or as non-affiliated. Twenty percent of all Hispanic registrants and 56.3% of all non-Hispanic registrants are Republicans. Dr. Bardwell's analysis of Democratic primaries has no relevance to the voting behavior of these groups.

Other factors are also important determinants of Hispanic and non-Hispanic voting patterns in House District 60. Incumbency, candidate gender, the particular characteristics of the candidates in each election (as examples, their personalities and political positions), and the socio-economic characteristics of the voters all have significant effects on the vote outcomes in precincts in this District.[5] Dr. Bardwell's analysis simply ignores these important factors. It thereby produces inaccurate and unreliable statistical results.

[P. 3]

My analysis also demonstrates that Hispanic voting patterns are not homogeneous.[6] In addition, it shows that Hispanic voters in House District 60 do not cohesively vote for Hispanic candidates. Further, it demonstrates that Hispanics in Pueblo county, an area included in plaintiffs' Alternative District 60, vote very differently than Hispanics in the current House District 60.

Lastly, my analysis conclusively contradicts Dr. Bardwell's claim that Hispanic candidates are disadvantaged in State House District 60. To the contrary, Hispanic

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[5] Exhibits 2(a-d) of my report of 6 December 1993 present these other factors.

[6] See Section IV, pages 16-22 of my report of 13 December 1993.

Democratic candidates for this District, without exception, receive higher percentages of the votes cast in this District's elections than do Anglo Democratic candidates.[7] Moreover, a comparison of election results in the 1980's and 1990's for State House District 60 demonstrates that vote patterns at the county level are not be [sic] racially polarized.[8] Finally, my analysis finds that the current percentage of Hispanics in State House District 60 is sufficiently large that, on average, Democratic candidates can expect to obtain a majority of the votes.[9] This conclusion holds for all combinations of characteristics of Democratic and opposing candidates, except in the cases where the opposing candidate is the incumbent.

Even if one were to accept the oversimplistic assumptions regarding voting behavior contained in Dr. Bardwell's analysis, his analysis is so fraught with fundamental flaws that **[P. 4]** it is without scientific merit.[10] First, Dr. Bardwell's methodology produces estimates that are at best biased and at worst inconsistent.[11] Second, Dr. Bardwell's analysis fails to conform to accepted standards of statistical proof. [12] For example, he makes no attempt to provide standard errors for his ratio estimators of racial

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[7] See page 8 of my report of 25 February.

[8] See pages 8-9 of my report of 25 February.

[9] See pages 10-14 and Exhibits 3-4 of my report of 6 December 1993.

[10] See my "Response to 'Report of Robert A. Bardwell, Ph.D.'", 13 December 1993

[11] See section I, pages 1-5 of my report of 13 December 1993.

[12] See pages 6-7 of my report of 25 February 1993.

polarization and bloc voting. Third, his analysis contains "specification" errors that produce statistically unreliable results. Use of 1990 Census data to evaluate elections in the 1980's is clearly inappropriate. He biases [sic] his results in favor of his premise by using 1990 Census data to 'explain' election results that occur in the 1980's. He also fails to explain how data collection problems were resolved, if at all, and how changes in precinct boundaries were accounted for. Dr. Bardwell's reports have, in addition to these flaws, a number of other flaws which are set forth in my various reports.

Determinants of Voting Behavior in
Colorado State House District 60

Prepared on behalf of the Office of the
Attorney General, State of Colorado

by

Jeffrey S. Zax, Ph.D.

6 December 1993

[P. 1]

I. Summary

This report presents an analysis of voting behavior in the precincts that currently comprise Colorado State House District 60 for the elections that took place in 1990 and 1992. This analysis yields the following four results:

1. The determinants of voting behavior vary somewhat from election to election. This suggests that rigid characterizations of voter 'preferences' are to some degree inappropriate (see exhibit 1 and the attendant discussion).

2. Anglo citizens of voting age tend to prefer non-Democratic candidates. However, precincts in which all citizens of voting age are Anglo may nevertheless yield a majority of votes for a Democratic candidate, and even for a minority Democratic candidate, depending on individual candidate characteristics (see exhibits 3a and 3b).

3. Hispanic citizens of voting age tend to have strong preferences for Democratic candidates. However, their preferences for minority Democratic

candidates are no stronger than, and may be less than, those for Anglo Democratic candidates. At the same time, they tend to prefer minority non-Democratic candidates to Anglo non-Democratic candidates (see exhibit 2e).

4. The current proportion of Hispanics in Colorado House District 60 is sufficiently large that, on average, Democratic candidates should expect to obtain a majority of votes cast in this district unless their opponent is an incumbent (see exhibits 4a through 4g).

These results are based on precinct-level data. Inferences based on these results for the behavior of individuals or groups -- Anglo or Hispanic voters, for example -- within precincts must be interpreted with caution. Nevertheless, these results are sufficiently strong as to suggest that Hispanic and Anglo voters differ in their electoral behavior. The principal [P. 2] distinction between them appears to be partisan: Hispanics tend to support Democratic candidates more strongly, while Anglos support Republicans. Given these tendencies, candidate ethnicity plays a subsidiary role in determining Hispanic and Anglo voting behavior.

The following sections discuss these conclusions in detail. Section II describes the form of the analysis. Section III presents the full regression results. Section IV uses these results to predict the electoral success of Democratic candidates under various combinations of candidate characteristics and Hispanic voting age population shares. Section V reviews the principal results of the analysis.

II. Methodology

This report is based on an analysis of all election contests in

1990 and 1992 within the current boundaries of House District 60 in which more than one candidate received votes, whether the offices at issue were federal, state or county. The analysis includes all precincts within the current District 60, with the exceptions of precinct 9A of Las Animas in both elections, all precincts of Huerfano county in the 1992 election and precincts 13 and 14 of Alamosa county in the 1992 election. These precincts are omitted because demographic data are not available for them. The analysis also omits absentee ballots from both the 1990 and 1992 elections, again because the demographic characteristics of absentee voters are unknown. In sum, the analysis includes data from 74 precincts and 53 contests, for a total of 1393 precinct-contests.[1]

The analysis takes the form of regression equations that relate 49 explanatory variables **[P. 3]** and a constant to the share of votes in a precinct cast in favor of the Democratic candidate in any particular contest.[2] For the purpose of understanding the effects of ethnicity on voting behavior, the most important variable measures the share of Hispanics in the precinct's voting age population. The effects of this variable, presented in exhibit 2e, indicate the relationship between ethnic composition and partisan preference.

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[1] The omitted precincts include 104 precinct-races, or 6.95% of all the precinct-races in House District 60 for the 1990 and 1992 elections.

[2] The conclusions in this report would not change if the regression equations took the share of votes received by the opposing candidate as the dependent variable. Formally, coefficient signs would be reversed but neither coefficient magnitudes nor interpretations would be affected. In 50 of the 53 contests analyzed here, the sole or principal opposing candidate was Republican.

Twelve other variables, in two sets of six, are also important for this purpose. The first set is comprised of six 'dummy, variables identifying minority status, gender and incumbency for the Democratic and opposing candidate.[3] These variables identify average voting preferences for candidates with different measurable characteristics (see exhibit 2d). The second set is comprised of 'interactions' between these dummy variables and the share of Hispanics in the voting age population. The variables identify any differences in preferences for candidate characteristics between precincts with different concentrations of Hispanic voting-age residents (see exhibit 2e).

The remaining 36 variables serve principally to ensure that the estimated effects of the variables measuring voter population ethnicity, candidate characterisitics [sic] and the interactions between voter population ethnicity and candidate characteristics are as free as possible from bias. They are therefore chosen so as to include as many of the other **[P. 4]** determinants of voting behavior as possible.[4] The individual effects of these variables are, for the most part, less important than their capacity to purge the variables of interest of any spurious effects.

Of these variables, 19 account for variations in electoral behavior across contests. Eighteen are dummies for the

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[3] Throughout, the "opposing candidate" and "opponent" in the 11 contests with more than two candidates is the candidate among all non-Democrats receiving the most votes.

[4] If a regression equation omits important explanatory variables, and these variables are correlated with variables included in the regression, regression will, in effect, 'impute' some part of the effects of the omitted variables to those that are included. The estimated effects of the included variables will therefore be biased.

federal and state contests examined here. As a group, they identify any differences in the tendencies of precincts to support Democratic candidates at these levels as opposed to the county level. Individually, they identify any differences in the share of votes cast for the Democratic candidate across these contests on that are attributable to the particular characteristics of the candidates or issues involved in these contests (see exhibit 2b). An additional variable measures the number of candidates in each contest, to account for any systematic reduction in the Democratic share that might arise out of increasing the number of choices available to voters (see exhibit 2d).

The final seventeen variables capture variations in the electorate. Seven are dummy variables for counties.[5] They identify county-specific 'tendencies' to support Democratic candidates (see exhibit 2a). The other ten variables measure socio-economic characteristics of precinct populations (see exhibit 2c). These variables identify the mix of interests, apart from ethnicity, that might be present in a precinct's population.

* * *

[P. 14]

V. Conclusion

The regression analyses discussed here suggest, first, that among the precincts in House District 60, those with larger shares of Hispanics in their voting age populations have unambiguously stronger preferences for Democratic candidates. Precincts with larger Hispanic voting age population shares are also more hostile to minority opponent

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[5] Alamosa county is the 'reference' county. It is not represented by an expicit [sic] dummy variable.

candidates, and may be relatively less enthusiastic about minority Democratic candidates than are precincts with smaller shares of Hispanics in their voting age populations.[14]

To the extent that these results suggest inferences regarding the preferences of the Hispanic voting age population, the overwhelming inference must be that this population prefers Democratic candidates. If anything, this population seems to prefer Anglo to minority Democrats. However, simulated elections suggest that ordinarily, both Anglo and minority male Democratic candidates should obtain a majority of votes in any precinct where Hispanics comprise more than 40% of the voting age population. The average Hispanic share of this population exceeds 40% in the precincts of House District 60. Therefore, there is no indication in these data that the minority population of this District is at a substantial disadvantage in electing candidates of its 'choice'.

* * *

[14] These precincts are also indifferent or perhaps unfavorably disposed towards female candidates, relative to those with smaller Hispanic voting age population shares.

[P. 24]

Addendum to "Response of Robert A. Bardwell, Ph.D."

prepared on behalf of the Office of the
Attorney General, State of Colorado

by

Jeffrey S. Zax, Ph.D.

13 December 1993

I have reviewed Section 2(a) of Dr. Bardwell's December 6, 1993, expert report and found that of the 39 local and district contests involving Hispanic candidates included in his report (but excluding local Pueblo county elections), 24 of the Hispanic candidates won. In other words, the Hispanic candidates won 61.5% of these elections. This proportion understates the rate of success among all Hispanic candidates because Dr. Bardwell's report omits contests in which all candidates were Hispanic.

APPENDIX Q

* * *

REDIRECT EXAMINATION

BY MR. KNAIZER:

Q. With regard to your race against Mr. Marquez -- and Mr. Marquez, to your knowledge, held public office within the San Luis Valley at that time?

A. Restate that, please.

Q. I'm sorry. At that time that you ran against Mr. Marquez, do you know if Mr. Marquez had ever held public office in the valley?

A. Not to my knowledge.

Q. And at that time, how long had you held public office as a county commissioner?

A. 14 years.

Q. And to your knowledge, did you have name recognition **[P. 971]** within the valley as a result of your holding that office?

A. I had very good name recognition throughout the San Luis Valley at the time.

MR. KNAIZER: Thank you. That's all I have.

THE COURT: You were Alamosa County commissioner when?

THE WITNESS: 1968 to 1982.

MR. KNAIZER: That's all I have, Your Honor.

MR. MILLER: No further questions, Your Honor.

THE COURT: Thank you. You may step down.

THE WITNESS: Excuse me.

THE COURT: Call your next witness.

MR. KNAIZER: Our next witness, Your Honor, we would like to call Representative Mike Salaz.

DON L. M. SALAZ,

called by the defendants, was sworn and testified as follows:

COURTROOM DEPUTY: State your name and spell your last name for the record.

THE WITNESS: My name is Don Lewis Michael Salaz, S-a-l-a-z.

DIRECT EXAMINATION

BY MR. KNAIZER:

Q. Representative Salaz, where do you reside?

A. One twenty forty second, Trinidad, Colorado.

Q. That's in Las Animas County?

* * *

APPENDIX R

LEGISLATIVE COUNCIL
OF THE
COLORADO GENERAL ASSEMBLY

AN ANALYSIS OF
1990 BALLOT PROPOSALS

Research Publication No. 350
1990

* * *

[P. 19]

Limitation of Terms

AMENDMENT NO. 5 -- CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

Limitation of Terms

Ballot Title: *An amendment to the Colorado Constitution limiting the number of consecutive terms that may be served by the Governor, Lt. Governor, Secretary of State, Attorney General, Treasurer, members of the General Assembly, and United States Senators and Representatives elected from Colorado.*

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would:

-- limit the terms of office of the Governor, Lieutenant Governor, Secretary of State, State Treasurer, and Attorney General to two consecutive four year terms, effective for terms beginning on or after January 1, 1991;

-- limit the terms of office of state senators to two consecutive four-year terms, and state representatives to four consecutive two-year terms, effective for terms beginning on or after January 1, 1991;

-- limit the terms of office of Colorado's U.S. Senators to two consecutive six-year terms, and Colorado's U.S. Representatives to six consecutive two-year terms, effective for terms beginning on or after January 1, 1991;

-- declare the support of the people of Colorado for a nationwide limit of twelve consecutive years of service in the United States Senate and House of Representatives and for Colorado public officials to use their best efforts to work for such a limit;

-- declare the will of the people of Colorado to encourage the federal officials elected from Colorado to voluntarily observe the wishes of the people with respect to the limitation of congressional terms if any provision of the measure is determined to be invalid by the courts.

History

Efforts to limit the terms of elected officials have been made since the founding days of the United States of America. In 1777, the Continental Congress imposed a three-year limit on delegates under the Articles of Confederation. However, when the U.S. Constitution was drafted to replace the Articles of Confederation in 1789, term limitations were not incorporated into the constitution. At present, there are no limits on congressional terms in the

U.S. Constitution, although presidential terms were limited to two four-year terms with the ratification of the 22nd Amendment to the U.S. Constitution in 1951. To date, no state has constitutionally limited the terms of its federal officeholders. The issue of whether it is constitutional for a state to limit the terms of its federal officeholders has not been decided upon by the courts.

Comments on the Proposed Amendment

The following three tables present a profiled of Colorado's state and federal elected officeholders in terms of how many years they serve, the amount of turnover in elected office, and the extent to which current officeholders maintain their positions.

[P. 20]

Limitation of Terms

TABLE I

The **average tenure**, or number of years served, for state and federal public officeholders between 1960 and 1988 was:

Colorado delegation to U.S. Congress	
Members of House of Representatives	6.0 years (3 terms)
Members of Senate*	9.6 years (1.6 terms)
State Offices	
State Representatives	4.5 years (2.3 terms)
State Senators	6.4 years (1.6 terms)
Executive Brance [sic] Elective Office**	6.8 years (1.7 terms)

* includes unfinished terms through 1990

**includes Governor, Lt. Governor, Sec. of State, Treasurer, and Attorney General

TABLE II

The **average turnover rate**, or ration of newly elected individuals to the total number of seats in a given year, during the **1980s** was:

	Colorado Congressional Delegation		General Assembly (100 members)		Executive Branch Elective Office	
1980	14%	(1/7)*	28%	(28/100)	no election	
1982	13%	(1/8)	39%	(39/100)	40%	(2/5)
1984	13%	(1/8)	25%	(25/100)	no election	
1986	50%	(4/8)	34%	(34/100)	60%	(3/5)
1988	0%	(0/8)	19%	(19/100)	no election	
(Avg)	18%		29%		50%	

*indicates # of newly elected/total # of seats

TABLE III

The **incumbency reelection rate**, or the rate at which officeholders seeking reelection win, was in the **1980s**:

	Colorado Congressional Delegation		General Assembly (100 members)		Executive Branch Elective Office	
1980	100%	(5/5)*	90%	(57/63)	no election	
1982	100%	(5/5)	88%	(45/51)	100%	(3/3)
1984	100%	(6/6)	92%	(57/62)	no election	
1986	75%	(3/4)	88%	(53/60)	100%	(2/2)
1988	100%	(6/6)	97%	(65/67)	no election	
(Avg)	95%		91%		100%	

*indicates # elected/# seeking reelection

APPENDIX S

* * *

[P. 702]

AVELINO MUNIZ,

called by the defendants, was sworn and testified as follows:

COURTROOM DEPUTY: State you name and spell your last.

THE WITNESS: My name is Avelino Muniz, A-v-e-l-i-n-o, M-u-n-i-z.

DIRECT EXAMINATION

BY MR. KNAIZER:

Q. Mr. Muniz, what is your address?

A. 10542 State Highway 15, La Jara, Colorado.

Q. What county is that in?

A. Conejos County.

Q. How long have you been a resident of Colorado?

A. All my life.

Q. How long have you been a resident of Conejos County?

A. All but about, oh, say 10 years of my life, 12 years.

Q. What county did you reside in before that?

A. Alamosa.

Q. How long did you reside in Alamosa?

A. About 10, 12 years.

Q. Where did you reside before that, which county?

A. Before Alamosa?

[P. 703]
Q. Yes.

A. I was in Conejos County then.

Q. And how old are you?

A. 54.

Q. And for what period of your life did you reside in Conejos County?

A. A period of about -- from age of 13 to 20 and then back the last 15 years.

Q. And how long can you trace your ancestry in Colorado?

A. In Colorado we could go back to about -- around approximately the 1860s.

Q. And before that time?

A. Before that time, they were coming -- or living in New Mexico, coming up from Mexico.

Q. And what is your -- what is your occupation presently?

A. Rancher.

Q. And what size ranch do you have?

A. Acres.

Q. And do you own or lease the property?

A. No. We own the property.

Q. And what kind of ranching do you do?

A. We raise hay, grain, livestock.

Q. What's the size of your herd, your livestock herd? I guess what kind of livestock do you have?

A. It varies. Summertimes we run yearlings. And it could **[P. 704]** vary, livestock.

Q. What was your occupation before you were a rancher?

A. Well, I've been a rancher most of my life. I've worked for other people very few, maybe about four years of my life.

Q. Do you identify yourself as Hispanic?

A. Yes.

Q. And are you affiliated with a particular political party?

A. I am affiliated with the Republican party.

Q. How long have you been affiliated with the Republican Party?

A. I have -- registered when I was 21 years, and I've been republican.

Q. Do you actively participate in the Republican Party?

A. Yes, I do.

Q. Could you briefly describe your activities within the party.

A. Probably since I registered, I've always participated in the Republican Party and campaigning or working for somebody in one way or another, whatever it takes.

Q. Has this been primarily in Conejos and Alamosa Counties?

A. Yes.

Q. And have you ever held any elective offices?

A. Yes.

Q. And what were those offices?

A. Well, I was elected to county commissioner in Conejos [P. 705] County.

Q. When were you elected?

A. In 1988, I think.

Q. And how long did you hold that office?

A. Four years.

Q. And did you run again in '92?

A. Yes.

Q. And did you run in a primary?

A. Yes.

Q. And I take it that was, obviously, against another republican.

A. Yes.

Q. And what was the results of that primary?

A. I lost.

Q. And who was your opponent -- who was your opponent in the primary?

A. I lost to Mr. Richardson, Norman Richardson.

Q. Now, what were your duties as county commissioner?

A. As county commissioners, we had the duties of taking care of the county business, whatever it had to be, budgets, preparations, planning, everything that it took to do within -- working on grants, whatever you had to do.

Q. When you were on the commission, how many republicans were on the commission?

A. There was another republican.

[P. 706]

THE COURT: When were you elected as county commissioner?

THE WITNESS: 1988.

THE COURT: Thank you.

BY MR. KNAIZER:

Q. Now, when you were campaigning in 1988, could you describe the communities that you visited within Conejos County.

A. Probably -- when I campaigned in 1988, I probably visited a neighborhood of about 94 percent of the households in the county.

Q. Did you visit both Anglo and Hispanic households?
A. Yes, every household that I could.

Q. Could you describe your campaign experience in the Anglo households in 1988.

A. To me, it was -- the campaign was pretty delightful both in Hispanic and Anglos. I found no problem in that. I found a problem that I was spending too much time visiting with everybody and maybe ran out of time. But I -- I enjoyed it, both of them. I had no problems.

Q. Did you campaign in the Mormon communities within Conejos County?

A. Yes.

Q. Could you describe your reception there.

A. Very well.

Q. Again, in the Hispanic communities?

[P. 707]

A. I didn't have no problem at all in the Hispanic communities.

Q. Did you have any problem in the Anglo communities?

A. I didn't have a problem with anybody.

Q. Now, in 1988 -- excuse me -- 1992, did you do door-to-door campaigning in the primary election?

A. No.

Q. Now, with regard to the Republican Party in Conejos County, could you describe the party structure.

A. Well, the party structure is similar to most of them. The central committee is the nucleus of the party, and it consists of 10 precincts. Each precinct has two persons in the central committee, plus your elected officials of the party are -- are the central committee. And I think the other one, the chairman does not have to be a precinct committee person to be in there. That's what makes it up.

Q. And what percentage of the Republican Party in Conejos County is Hispanic, if you know?

A. It's about 50-50.

Q. And who is the chairperson of the Republican Party in --

A. Presently?

Q. Presently.

A. Lucy Quintana.

Q. Is she Hispanic?

A. She's Hispanic.

[P. 708]

Q. Now, are you familiar with the San Luis Valley County Commissioners Association?

A. Yes, I am.

Q. And could you please tell the Court what that is. Briefly describe it.

A. San Luis Valley commission association is an association of the six-county commissioners, which is 18 commissioners, formed to probably work out -- most of the things within the county commissioners are duplications of one sort or another. And we have quite a few joint funding ventures that we have to get together. We have to work them out -- once a year to work that thing out. Other than that, it's information shared by county commissioners from one county to another, very good way to share information.

Q. And why did the San Luis Valley counties decide to form this association?

A. Well, it was formed before my time, but I would assume it's basically to share information back and forth to one another.

Q. Now, at the time you were elected and a part of the San Luis Valley County Commissioners Association, did you hold an office with the association?

A. Yes. I was president of the association.

Q. And during the time you were in there, how many members of the association -- that is, how many county commissioners -- **[P. 709]** were Hispanic?

A. Seven.

Q. And how many were Anglo?

A. Eleven.

Q. Now, are you also familiar with an organization called the Southern District of State County Commissioners?

A. Yes, I am.

Q. And what is that?

A. That is seven counties directly east to the state line of Kansas from the San Luis Valley.

Q. And is that a part of a larger organization?

A. Part of a large organization of Colorado Counties, Incorporated.

Q. Colorado Counties, Incorporated, is a private, nonprofit organization made up of Colorado counties?

A. Yes. It is the organization of Colorado county commissioners, headquartered here in Denver.

Q. And is Pueblo County included in that?

A. Of the CCI, yes, but not of the southern district.

Q. I'm sorry. I was talking about the southern district

A. No, it does not include the southern district.

Q. Do you know why Pueblo is not included?

A. It is a separate district in the southern district.

Q. Now, could you please describe for me some of the issues which are common to the six valley counties that you've **[P. 710]** described.

A. Well, water would be one of the issues, the way you administer social programs, wellness programs, highway issues. Pretty much everything is common to the counties within San Luis Valley of what goes on in one county to the other one.

Q. What about the economy?

A. Well, the economy for purpose of taxation, that would be the common interest.

Q. And in 1991 -- 1990, did the San Luis Valley -- I'm sorry -- 1991, did the San Luis Valley commissioners take a position with regard to the plans presented to the Reapportionment Commission?

A. Yes.

Q. Could you tell me what the position was.

A. The position that we took, we took quite a bit of time when we were trying to -- I think it was Peggy Ventura plan that they were trying -- the commission -- Reapportionment Commission was trying to get. We did not agree with that plan because it disturbed the community of interest. And we took the position that we wanted to keep the San Luis Valley whole if we could. And that was the position that we took.

Q. Again, what was that community of interest?

A. Community of interest is the whole San Luis Valley and what happens within the San Luis Valley basically, water [P. 711] issues, agricultural issues, all the other issues that take place within our San Luis Valley unique to us.

Q. And did the County Commissioners Association -- that is, the San Luis Valley County Commissioners Association -- take the position with regard to American Water Development, Incorporated?

A. Yes. We took a position that we could support the fight against AWDI.

Q. And how did your support manifest itself?

A. It was a verbal support initiated on down so that each county would do whatever you had to do to support them.

Q. Was there a vote taken in the valley with regard to raising taxes to oppose AWDI?

A. There was. There was a vote to raise money to hire attorneys that is was going to take to fight this very expensive litigation that it was going to take place against AWDI.

Q. And how was the money to be raised?

A. The money was -- to be raised was to tax property to raise the tax. There was a mill levy that was going to be assessed.

Q. So people voted to raise their taxes?

A. Yes.

Q. Why is it such an important issue to the valley?

A. Water is the element in the valley that is very, very important. That is the lifeblood of the whole San Luis **[P. 712]** Valley. We just -- as is the community of interest, we just had to stick together and we had to defend ourselves. And that's -- that was the outcome. It was evident there was going to be a very expensive legal battle to take place with that, and we were not going to give in without having a say-so in it.

Q. And in your experience, both -- as a member of the Republican Party and as a candidate and as a voter, do you find that Hispanics will vote for Anglos?
A. Oh, yes.

Q. And do you find that Anglos will vote for Hispanics?

A. Yes, they will.

Q. Did you take a position with regard to Mr. Entz in House District 60 in the 1992 election?

A. Yes.

Q. And did you -- what was your vote with regard to Mr. Entz?

A. You're asking whether I supported him?

Q. Yes.

A. Yes, I supported Mr. Entz.

Q. And did you -- you're aware, as I recall, that Mr. Cas Garcia ran for district attorney.

A. Yes.

Q. Do you recall who his opponent was?

A. His opponent was Cathy Mullens.

Q. And Ms. Mullens was --

[P. 713]

A. A democrat.

Q. And who did you vote for?

A. I voted for and supported Cathy Mullens.

Q. Now, in your experience in campaigning, does incumbency play a role in election in the valley?

A. To a certain extent, it may, yes.

Q. How about name recognition? Does name recognition play a role?

A. Probably more so.

Q. How about family ties, family connections?

A. It could work both ways.

Q. Okay. Depending on the family, I take it. Okay.

And does party play a role?

A. Yes, it plays its role, but it's not the dominating role.

Q. How about ethnicity? Does ethnicity play a role?

A. Give it to me in a different form.

Q. Does the fact that one is Hispanic or Anglo play a role in the election?

A. Well, it may somewhat, yes.

Q. And in your view, does ethnicity play an important role?

A. It's not that important. It isn't a dominator role.

MR. KNAIZER: Your Honor, I see it's noon, and I do have about ten more minutes.

THE COURT: Okay. We'll take a recess until 1:30.

Do you want to step down, sir.

* * *

[P. 715]

THE WITNESS: Avelino Muniz.

THE COURT: You are still under oath, having been previously sworn.

You may proceed.

BY MR. KNAIZER:

Q. Mr. Muniz, getting back to the vote on AWDI, do you recall what the percentage vote was in favor of raising the taxes?

A. It was 98 percent in favor and 2 percent against.

Q. Now, in your experience as a member of the Republican Party and as a candidate seeking votes, did you find that a Hispanics were united on political and economic issues?

A. No. In my experience, they are not totally united on everything. It just depends what -- what your line of business is or what you do or where you're going to unite yourself. You know, I would say --

Q. And could you give us a little background on how you came to know Representative Entz.

A. Well, Representative Entz and I have been pretty good friends for quite a few years, going back to, oh, the 19-- -- late 1970's when I was serving on the Rural Electric Board. Entz and us used to do a lot of work together. I knew him before when he was a county commissioner in Alamosa County. I've known Entz for a long time.

Q. For those of us who come from the big city, what is Rural Electric Board?

[P. 716]

A. Well, Rural Electric Board is similar to a Public Service system. It's a public utilities within the area that was formed to serve the outlying areas in there which serves a portion of the San Luis Valley.

Q. How do you come to serve on the board?

A. To serve on the board, you must be elected through the members of the electric utility company that's serving the area.

Q. And are you familiar with the area called the Holy Land?

A. Yeah. It's interesting. I am familiar with the area.

Q. Was the Holy Land a part of the area that was served by the Rural Electric Board?

A. Yes.

Q. And were you elected by members of the board who came from the Holy Land?

A. I ran for election twice on the board; and then after the third time, I did not run for election. I decided not to run anymore. My main area that was -- elected me was always from the Monte Vista area.

Q. Is that the Holy Land?

A. I guess that's what --

Q. Did you receive support from Mr. Entz for your election to the board? Do you recall?

A. I always received his support.

APPENDIX T

* * *

DIRECT - MEDINA

[P. 673]

Q. Can you describe your education since high school.

A. Military training. I'm a Vietnam veteran. I attended four years at Adams State, was trying to obtain a bachelor of art's degree in education. And I basically got out of that and went into law enforcement. I'm a graduate from the National Sheriff's Institute in Evanston or Northwestern in Evanston, Illinois. I'm a graduate of the Colorado Sheriff's Association. I'm a CLETA graduate. And I'm working on an associate criminal justice degree at this point.

Q. And where do you presently work?

A. I work for the County of Rio Grande as Rio Grande County sheriff.

Q. Is Rio Grande County sheriff an elected position?

A. Yes, ma'am. I'm seeking my third term.

Q. Okay. When were you first elected sheriff of Rio Grande County?

A. 1986.

Q. Is it your understanding that you were the first Hispanic sheriff to be elected as Rio Grande County sheriff at that time?

A. As -- as history says, yeah.

Q. In 1986 during your first campaign for sheriff, did you run against an incumbent?

A. I ran against an eight-year republican incumbent.

Q. Who was that?

[P. 674]

A. John L. Cameracel (phonetic).

Q. Was he a Hispanic or an Anglo?

A. He was, I assume, an Anglo.

Q. Did you run as a republican or democrat?

A. I ran as a democrat.

Q. Have you always been a democrat?

A. I was independent for a couple years after the military. In 1976 I changed over to democratic status, yes.

Q. In your second campaign for sheriff -- you indicated you had served three terms -- or you were on your second term -- did you also run against an Anglo?

A. I ran against Fred McKee, who was a republican.

Q. And was he also an Anglo?

A. Yes.

Q. Are you a member of --

THE COURT: When was that? What year?

THE WITNESS: Pardon?

THE COURT: What year were you reelected?

THE WITNESS: 1990, sir.

THE COURT: '90. So you were first elected when?

THE WITNESS: In '86 --

THE COURT: '6.

THE WITNESS: -- for four years and 1990 for four. I'm up for reelection in 1994.

BY MS. McCLOUD-CHAN:

[P. 675]

Q. Are you a member of any professional organizations?

A. Yes. I'm the past president of the San Luis Valley Peace Officer's Association, current member of that, Ducks Unlimited -- San Luis Valley Ducks Unlimited, Elks Club, the American Foreign Wars, the American Legion, and -- I can't think of anything else.

Q. Okay. Are other Hispanics involved in these organizations?

A. The American Legion and the military type are predominantly Hispanic. The Ducks Unlimited green wing is predominantly Anglo. I'm probably the only member.

Q. Okay. Have you been working to try and obtain additional membership in the San Luis valley Ducks Unlimited organization?

A. Yes, I have. I'm currently on the green wing committee which has an emphasis on gun safety for little -- little guys, you know, little children, and from the ages of 6 to probably 18. And I'm working hard to try to bring in some of the Hispanic fathers and sons into the organization and trying to promote, you know, more of a unity towards, you know, family -- family values and also guns safety. And they really go into the water life preservation and safety hunting, and that's real important to me.

Q. Are you a member of the San Luis Valley Hispanic League?

A. Yes, I am.

[P. 676]

Q. When did you join the Hispanic League?

A. Last year in January or February.

Q. And why did you join the league?

A. I -- Juan Gomez and a few other people, you know, called me and said that maybe I should, you know, join. And I also talked to Arnold Salazar. And Arnold is trying to put together a coalition to form some kind of a money base for politically active people that -- you know, that -- so we won't have to be spending a lot of time out gathering campaign funds, where we would have a source where we could -- as a candidate of a Hispanic League choice, would be able to dip into -- into that fund and be able to run without having to go out and beg, borrow, or steal.

Q. Have you ever been appointed to any boards or commission at the state level?

A. The governor appointed me to the Colorado POS board, peace officers and standard, and I served there for four years.

Q. Are you actively involved in the Democratic Party in Rio Grande County?

A. I am as a --

THE COURT: Which governor was that, Romer or Lamm?

THE WITNESS: Romer, sir.

BY MS. McCLOUD-CHAN:

Q. Do you regularly attend Democratic Party meetings?

A. Yes, I do.

[P. 677]

Q. Is the Democratic Party in Rio Grande County predominantly Hispanic or Anglo?

A. Hispanic.

Q. Does the party have officers?

A. Yes, it does.

Q. Who are the current officers?

A. Mike Lister is our current chairman. He is Hispanic. Robin Kritz (phonetic) is vice chair along with Connie Gonzales. And secretary is Dorothy Gimlin (phonetic), and treasurer is Patsy Montoya. I believe that's it.

Q. Okay. Are the treasurer and vice chairman also Hispanic?

A. The treasurer and vice --

Q. Vice chairman Connie Gonzales.

A. Yes, she is.

Q. Okay. Have you ever been an officer yourself?

A. I've been a -- no.

Q. Are you married?

A. Yes, I am.

Q. And has your wife ever been an officer in a Democratic Party?

A. She has been past chairman of the Democratic Party and secretary.

Q. Okay. Does the Rio Grande Democratic Party have any committees?

A. Ask that question again, please.

[P. 678]

Q. Does the Rio Grande Democratic Party have any committees?

A. They have a central committee, which I'm a part of.

Q. Okay. Are Hispanics currently serving, other than you, as committee members on the central committee?

A. Yes.

Q. Does the Democratic Party in Rio Grande County appoint persons to serve as election watchers?

A. I believe they do.

Q. And in your recollection, have Hispanics served in a position of election watchers?

A. Yes.

Q. You said that the Democratic Party is predominantly Hispanic. Are most Hispanics democrats, based on your observations?

A. Yes.

Q. What I'd like to do now is discuss, just very briefly, some of your campaign experiences. Can you describe how yo went about campaigning in your first election in 1986.

A. A grass roots campaign, door to door mainly. I do -- since I'm a rancher, I campaign with my horses. I have three or four teams, and I give free rides to children and church groups. I've gone door to door.

One experience that I had was an elderly lady who was in her 80s. I had worked with her when I was undersheriff for Ric Grande County, had done this identification type. I went **[P. 679]** into her home and marked a lot of her valuables like silver. I made sure that, you know, I didn't distort any of the valuables and had worked with her a number of times, translating with her with some of her help and so forth.

When I walked into her house -- she lives in what we call the Holy Land, Center area -- Sergeant area. Anyway, when I walked in -- when I walked into her house, she saw me coming. And she's Anglo. And she opened the door and she hugged me and she said, Desi, she says, I've taught you in school, I've helped you out. And she says, You're going to make a wonderful sheriff. You're going to be -- you're going to win. I was ecstatic.

At that time, I was offered a piece of cake and coffee, and we sat and we discussed the politics and different things. And she was just so excited about me being sheriff and I was going to make sheriff and so forth.

So as I was walking out, I turned. And I thought, well, I haven't asked her for her vote. I said, Well, I hope you will vote for me. She said -- she looked and she stopped and she said, Oh, no, Desi, I can't. You're a democrat.

I looked at her and I said, But you've known me all your life. I said, You taught me in school. And she says, But, she says, if you would have -- if you were republican, I'd vote for you, but I can't. And I said I accept that. I can accept that. She said, You're going to win.

[P. 680]

So basically, after I won the election, she was one of the first to call me and congratulate me. That's -- that's one experience that I had.

Q. Okay. Did you campaign in all areas of Rio Grande County?

A. Yes. 14 precincts.

Q. Okay.

A. 15.

Q. Did you also campaign in any areas where anyone had suggested that you might limit your campaigning in that area?

A. Precinct 5, which is what we call the Holy Land, predominantly Anglo. I -- fluent -- a lot of warehouses, potato warehouses, a lot of money, a good tax base. Ted Elliott, past county commissioner, came to me and said -- very supportive individual, democrat, Anglo -- came to me and he said. One word of advice. He says, Don't bother with Precinct 5. I said, Why?

He said, Basically, I've lived here all my life. I've gone to church here, raised here. I've carried maybe 20 percent of the vote since I'm a democrat. I said, Okay, fine. My wife and I discussed this. I went ahead and did a lot of campaigning in that area. And when I won the election, I went back to the statistics, and it was, basically, I had beat him in statistics. I think it was -- I'm not sure, but I think it was 40 percent.

Q. And that is a predominantly republican registered **[P. 681]** precinct?

A. I'm having a hard time finding one democrat there now.

Q. Are you planning on running for reelection in 1994 as sheriff?

A. Yes. I've declared.

Q. Has anyone else announced that they'll be running against you?

A. Yes. For the first time, I'll have a primary Hispanic running against me. An ex-employee is running in the Democratic Party. I have -- an unaffiliated individual, John Valdez, is running against me and a republican ex-chief of police by the name of Bob King. So there's four of us running.

Q. And are you planning on doing anything differently in your campaign for 1994 than you did in 1986?

A. Balloons. I would like to explain that. I do these animal balloons. I carry a pump in my -- in my coat pocket, and I carry a bunch of balloons. When I see little kids, I make them little dogs and bees and things. In passing, I ask their parents to vote to [sic] me. It's really working for me. I don't know. Grass roots, door-to-door-type thing.

Q. Okay. And do you have aspirations to seek higher political office?

A. Oh, yes. I have vision of maybe looking into the 60th representative.

[P. 682]

Q. Okay. And have you --

A. May I have some water?

Q. Sure. Have you had an opportunity to review any of the plaintiffs' proposed alternative districts in connection with this lawsuit?

A. Yes.

Q. I'd like to show you what's been marked and accepted as Exhibit 2R. Is this the plan that you had an opportunity to review?

A. That says Sanchez -- Sanchez/Grant alternative?

Q. Yes.

A. Yes. Yes, it is.

Q. Okay. And if such a plan as this were adopted for House District 60, would it affect your decision to seek that office?

A. Most definitely. In fact if I could point out to the Judge?

Q. Okay.

A. This is, I'm sure, Rio Grande County. My ranch is located right here, Your Honor, in this white area. And that would put be out -- outside the district.

Q. Okay.

THE COURT: So even though you live in Del Norte, your ranch is up by South Fork, so you would be outside --

THE WITNESS: Yes.

[P. 683]

THE COURT: You said you're in Del Norte, meaning you're employed in Del Norte.

THE WITNESS: My address is -- right. My address is Del Norte, but I live in South Fork. Our mail goes through Del Norte post office.

THE COURT: Where is your ranch exactly geographically?

THE WITNESS: Do you know South Fork, Colorado?

THE COURT: Um-hum.

THE WITNESS: It would be north -- it's called Agua de Ramon, A-g-u-a-, d-e, R-a-m-o-n. And it's an old Spanish settlement, about 20 families. And the people during the '30s and' [sic] 20s left, and my father and mother both remained there. They were childhood sweethearts, and they bought their big ranch together, about a thousand acres. It's not that big but -- and we live north of South Fork -- northeast of South Fork about five miles.

BY MS. McCLOUD-CHAN:

Q. Assuming that you still lived within the bounds of House District 60, if it was still configured in a manner as the plaintiffs' alternative district here, would it affect the way that you had to go about campaigning for the office?

A. Could you ask that again.

Q. If you lived in this district, House District 60, the plaintiffs' alternative --

[P. 684]
A. Right there?

Q. Right -- would it affect the way you had to campaign for the office of representative?

A. Most definitely. I'd have to campaign -- I would lose half of Rio Grande and Conejos County and Castilla and Saguache. I've been campaigning -- have -- people know me, I mean, throughout the area, and it would most definitely hurt me personally.

Q. Okay. Would you prefer to seek the office of House District 60 as it's presently --

A. Yes.

Q. -- drawn.

A. Yes.

Q. In the 1992 election for House District 60, who did you support?

A. In 1992?

Q. Yes.

A. Was that Entz and Jaramillo?

Q. Yes, it was.

A. Okay. I supported Mr. Entz.

Q. And why did you support Mr. Entz?

A. I crossed over. He is a republican, and I crossed over simply because of water rights, AWDI. His work in hard work with us -- with the search and rescue bill which has helped in law enforcement, the 25 cents. And he and I have a lot in **[P. 685]** common in reference to range, cattle range and different Forest Service problems that we have, and mainly the water.

Q. Would you ever anticipate running against Lewis Entz for House District 60 representative?

A. No. No, I wouldn't.

Q. Why is that?

A. Well, he's just -- it just wouldn't be -- I mean, it wouldn't be politically smart at this point.

Q. Why is that?

A. He's just well known. I could go head-to-head with an unknown republican, I think, and win. But right now, I couldn't beat Entz.

MS. McCLOUD-CHAN: Okay. I have no further questions.

* * *

[P. 701]

REDIRECT EXAMINATION

BY MS. McCLOUD-CHAN:

Q. I have just one question, Sheriff Medina. Why do you believe you got so much -- were effective in getting so much crossover?

A. Grass roots. I was born and raised in Del Norte, in South Fork, which is Precinct 10, predominantly Anglo. People know me. I went to school in Del Norte. People know me there. I worked for there and a half years in the city of Monte Vista and did a good job, evidently. And then I just -- just grass roots campaigning. People know me. I'm a people's person.

Q. Did you have to do a lot of hard work?

A. Oh, yes. I've been campaigning for the last four years for this next.

MS. McCLOUD-CHAN: Okay. I have no further questions.

* * *

APPENDIX U

* * *

CROSS - SANDOVAL

[P. 565]

THE COURT: Which?

COURTROOM DEPUTY: AI. That's how they started, apparently.

MS. McCLOUD-CHAN: It should be 2 something.

COURTROOM DEPUTY: Well, according to the last page of this, that's what I have.

THE COURT: Well, let's not make a federal issue out of it. What's the next exhibit number?

MS. McCLOUD-CHAN: 2X.

THE COURT: 2A?

MS. McCLOUD-CHAN: 2X.

THE COURT: 2X. Is that the next one? Okay. 2X. 2X for identification. Hand a copy to the witness. And go ahead, please.

A. What part of it are you reading?

BY MS. McCLOUD-CHAN:

Q. Dr. Sandoval, first of all, do you recognize --

THE COURT: Do you recognize this article?

THE WITNESS: Yes, I do.

THE COURT: Go ahead and read whatever you want.

BY MS. McCLOUD-CHAN:

Q. I'd like to refer you to page 3 of the article and the last paragraph in the second column, in the middle of that on then [sic] the third column, Hispanics have made great strides in advancing socially and economically. Hispanics today are **[P. 566]** better educated and can be found in all levels of business, government, and society. Hispanics are beginning to exert the same strong influence on the state that they did in the early days of Colorado's history. One reason for this is that Colorado Hispanics actively participate in politics.

Is that correct?

A. That's what I wrote, yeah.

Q. Okay.

MS. McCLOUD CHAN: Okay. I have no further questions.

THE COURT: Thank you.

MR. WESTFALL: One brief redirect, Your Honor.

THE COURT: I assume it's going to be very brief since she only asked one question.

MR. WESTFALL: That's all I have a question --

REDIRECT EXAMINATION

BY MR. WESTFALL:

Q. Dr. Sandoval, could you explain that and put it in the context of your work that you discussed today.

A. This is sort of like a college catalog. The Hispanic agenda, its purpose was to get an uplifted, optimistic overview. And I don't back off from that. I think when I wrote it in 1987, that throughout the state, that was happening. I look at the state legislature today and I see, instead of ten, three. But in any event, after the civil [P. 567] rights movement, there was and continues to be active political participation.

MR. WESTFALL: No further questions, Your Honor.

MS. McCLOUD-CHAN: Your Honor, I would like to offer that as an exhibit.

THE COURT: Okay. Any objection?

MR. WESTFALL: No objection.

THE COURT: 2X is received.

You may step down, Doctor.

MR. MILLER: Your Honor, before the plaintiffs rest, we had, over the break, spoke with plaintiffs' -- defendants' counsel. We have reached a stipulation that PX3 -- that's the petitions that were submitted to the Reapportionment Commission by the -- two of the plaintiffs and others, were in fact received by the Reapportionment Commission.

So I guess I would renew the offer for that to be admitted into evidence.

THE COURT: I thought we settled that with a stipulation that there was --

MR. KNAIZER: I thought --

THE COURT: -- quite a bit of support in the valley for the amendment -- or for that plan.

MR. KNAIZER: That's correct, Your Honor. With regard to what Mr. Miller said, I did talk to Ms. Ventura who was on the commission. She was here. She indicated it was . . . .

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APPENDIX V

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CROSS - J. SANCHEZ

[P. 479]
Q. Except for two people, okay.

THE COURT: Are you saying that the people voted out were Hispanic and the people voted in were also Hispanic? Is that the point here?

MR. KNAIZER: Yes. Yes.

Just a couple more questions, Your Honor.

THE COURT: Okay.

BY MR. KNAIZER:

Q. Now, I notice that you've been very active in the Democratic Party since -- for the last 20 years or so. Is that correct?

A. That's correct.

Q. And during that time, you have increased registration significantly through your efforts and the efforts of other Hispanics in the valley and in the Saguache County in particular?

A. Yes.

Q. So the Hispanic participation, to your knowledge, has grown fairly significantly over the course of the last 20 years due to your efforts?

A. I guess I could say that.

Q. Now, you had mentioned that you were concerned that Mr. Entz did not speak out against English-only or for bilingual education; is that correct?

A. Yes.

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